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No. 99-

IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., WEST OF ENGLAND SHIPOWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), CONTINENTAL INSURANCE COMPANY, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, AND MARINE OFFICE OF AMERICA CORP.,

Petitioners,

v.

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.), INC. REORGANIZATION TRUST AND ASBESTOS CLAIMANTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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184pp

QUESTIONS PRESENTED FOR REVIEW

1. Does a non-Article III bankruptcy judge have jurisdiction under the Constitution to determine, as a core bankruptcy proceeding, an adversary proceeding commenced by the reorganization trustee, as the debtors' successor-in-interest, seeking a declaration of allegedly disputed rights under the debtors' pre-petition insurance contracts with defendant insurers?

2. Does the bankruptcy court in a core proceeding have discretion to annul a valid arbitration agreement in a debtor's pre-petition contract calling for international arbitration.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petitioners are American Steamship Owners Mutual Protection and Indemnity Association, Inc., West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg), the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, Assuranceforeningen Skuld, Liverpool & London Steamship Protection and Indemnity Association Limited, and the Continental Insurance Company, added as a defendant by stipulation, which acted through its agent Marine Office of America Corp. (collectively referred to as the "Clubs"). The respondents are United States Lines, Inc. and United States Lines (S.A.), Inc., Reorganization Trust (hereinafter the "Trust"), and certain "Asbestos Claimants." "Asbestos Claimants" are all merchant mariners represented by the Maritime Asbestosis Legal Clinic, a division of The Jaques Admiralty Law Firm, P.C. The Travelers Insurance Co. and The Fulton Syndicate Survivors have not joined in this petition and are being served as respondents.

Petitioners The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited and Liverpool & London Steamship Protection and Indemnity Association Limited, Assuranceforeningen Skuld and West of England Ship Owners Mutual Insurance Association (Luxembourg) (collectively, the "foreign Clubs") are mutual protection and indemnity associations that do not issue shares to the public and have no parent companies or non wholly owned subsidiaries.

Petitioner American Steam Ship Owners Mutual Protection and Indemnity Association, Inc. ("American Club") hereby discloses that the present members of the American Club which issue shares to the public are: Atlantic Richfield Co., BP Oil Shipping, Inc. (British Petroleum), Union Carbide, Occidental Petroleum, and Rhodia, Inc. Members which might issue shares to the public are: Farmland Industries, Inc., Lafarge Corporation, Lyondell Petrochemical Co., OMI Petrolink Corp., and Servicios Protexa Construcciones S.A. de C.V. Also, the American Club's manager, Shipowners Claims Bureau, Inc., is a subsidiary affiliate of Marsh & McLennan Companies, which is publicly traded.

Petitioner, the Continental Insurance Company hereby discloses that on May 10, 1995, CNA Financial Corporation acquired The Continental Corporation, New York City, the former parent holding company of The Continental Insurance Company. The service mark CNA refers to a group of affiliated companies including Marine Office of America Corporation (sometimes referred to in the United States Lines bankruptcy documents as "MOAC", which acted as marine manager for The Continental Insurance Company) All American Marine Slip and the CNA Insurance Companies including The Continental Insurance Company. The direct or indirect parent company of all the CNA companies is CNA Financial Corporation, a publicly traded holding company domiciled in Delaware with its principal place of business in Chicago, Illinois.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding and Statement Pursuant to Rule 29.6 ii

Table of Contents iii

Table of Cited Authorities vi

Table of Appendices xv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions, Treaties and Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 4

I. The Second Circuit's Decision That This Is A Core Bankruptcy Proceeding Is In Conflict With The Relevant Decisions Of This Court And The Majority Of The Other Courts Of Appeals And Concerns An Important Federal Law Question That Has Not Been, But Should Be, Settled By This Court 4

Contents

	Page
A. The Conflict With Decisions Of This Court	4
B. The Conflict With The Majority Of The Other Courts of Appeals	11
C. The Core/Non-Core Issue Has Not Been, But Should Be, Settled By This Court In View Of The Lower Courts' Difficulties In Resolving It	14
II. The Second Circuit's Ruling That The Bankruptcy Court In A Core Proceeding Has Discretion To Annul Otherwise Valid Foreign Arbitration Agreements Brings To A Head The Clash Between Arbitration And Bankruptcy	15
A. The Second Circuit's Ruling Conflicts With Decisions Of This Court	15
B. The Second Circuit's Decision To Provide A Discretion To The Bankruptcy Courts Creates A Conflict Among The Circuits	19
C. The Second Circuit's Decision Undermines The United States' Obligations Under The New York Convention	22
Conclusion	27

TABLE OF CITED AUTHORITIES

Page

Cases:

Aasma et al. v. American S. S. Owners Mutual Protection & Indemnity Association, Inc., 95 F.3d 400 (6th Cir. 1996) 21

Barnett v. Stern, 909 F.2d 973 (7th Cir. 1990) 12

Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990) . 11

Bender Shipbuilding & Repair Co. v. Morgan, 28 B.R. 3 (9th Cir. B.A.P. 1983) 20

C. Itoh & Co. (America) Inc. v. Jordan International Co., 552 F.2d 1228 (7th Cir. 1977) 21

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) 18

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 11

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985) 16, 17

Diamond Mortg. Corp. of Illinois v. Sugar, 913 F.2d 1233 (7th Cir. 1990) 12

Dickinson v. Heinold Securities, Inc., 661 F.2d 638 (7th Cir. 1981) 22

Cited Authorities

Page

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Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 6, 10, 11

Hays & Co. v. Merrill Lynch, 885 F.2d 1149 (3d Cir. 1989) 11, 19

In re Apex Exp. Corp., 190 F.3d 624 (4th Cir. 1999) . 11

In re Castlerock Properties, 781 F.2d 159 (9th Cir. 1986) 13

In re Davis, 899 F.2d 1136 (11th Cir. 1990) 13, 14

In re Dollar Corporation, 139 B.R. 192 (Bankr. E.D. Mich. 1992) 16

In re Hart Ski Manufacturing Co., 18 B.R. 154 (Bankr. D. Minn. 1981), *amended* 22 B.R. 762 (Bankr. D. Minn. 1982), *aff'd*, 22 B.R. 763 (C.D. Minn. 1982), *aff'd*, 711 F.2d 845 (8th Cir. 1983) 20

In re National Gypsum Co., 118 F.3d 1056 (5th Cir. 1997) 20

In re Orion Pictures Corp., 4 F.3d 1095 (2d Cir. 1993), *cert. dismissed*, 511 U.S. 1026 (1994) ... 9, 10

Cited Authorities

Page

In re U.S. Brass Corp., 110 F.3d 1261 (7th Cir. 1997) 12, 13

In re Wood, 825 F.2d 90 (5th Cir. 1987) 12, 13

I.T.A.D. Associates, Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981) 21

Liskey v. Oppenheimer & Co., 717 F.2d 314 (6th Cir. 1983) 22

McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3d Cir. 1974) 21

Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986) 25, 26

Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 18, 24, 25

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 17

Murray v. The Charming Betsy, 2 Cranch 64, 2 L. Ed. 208 (1804) 24

Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 4, 5, 6, 8, 9, 10, 11

Cited Authorities

Page

Phar-Mor, Inc. v. Coopers & Lybrand, 22 F.3d 1228 (3d Cir. 1994) 11

Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993) 19, 20

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 17, 18, 19, 24

Sedco v. Petroleos Mexicanos Mexican National Oil Company, 767 F.2d 1140 (5th Cir. 1985) 22

Shearson/American Exp. Inc. v. McMahon, 482 U.S. 220 (1987) 17

Societe National Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp., 80 B.R. 606 (D. Mass. 1987) .. 16

Surmon v. Merrill, Lynch Pierce, Fenner & Smith, Inc., 733 F.2d 59 (8th Cir. 1984) 22

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 18

Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568 (1985) 6, 8, 11

Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984) 23

Cited Authorities

	Page
Victrix S.S. Co. S.A. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987)	22
Vimar Seguros y Reaseguros, S.A. v. M.V. Sky Reefer, 515 U.S. 528 (1995)	18
Statutes:	
9 U.S.C. § 2	1, 17
9 U.S.C. § 3	1, 3, 17, 20
9 U.S.C. § 4	1, 3, 17
9 U.S.C. § 201, *et seq.*	1, 3
9 U.S.C. § 202	1
9 U.S.C. § 203	1
9 U.S.C. § 206	1
11 U.S.C. § 49	23
11 U.S.C. § 554(a)	25
28 U.S.C. § 157	2, 5
28 U.S.C. § 157(a)	2

Cited Authorities

	Page
28 U.S.C. § 157(b)	2
28 U.S.C. § 157(b)(1)	5
28 U.S.C. § 157(b)(2)	5, 6
28 U.S.C. § 157(b)2(A)	3, 9, 11
28 U.S.C. § 157(b)(2)(E)	11
28 U.S.C. § 157(b)2(O)	3, 9, 11
28 U.S.C. § 157(b)(H)	6
28 U.S.C. § 157(c)(1)	5, 9
28 U.S.C. § 651	23
28 U.S.C. § 652	23
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1292(b)	3
28 U.S.C. § 1334(b)	2
Pub. L. No. 80-282, 61 Stat. 669 (1947)	23
Pub. L. No. 100-702, as amended Pub. L. 103-192, 107 Stat. 2292 (1993)	23

Page

Pub. L. 98-353, 98 Stat. 333 (1984) 2

Pub. L. 95-598, 92 Stat. 2549 (1978) 1

United States Constitution:

Article I 1

Article III 1, 4, 8, 10

Article VI 1, 16, 22

Seventh Amendment 6

Treaties:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S 38 (1970) 1

Other Authorities:

Chemerinsky, *Federal Jurisdiction* (3d Ed. 1999) § 4.5.3 14

Deitnick, *The Conflicting Policies Between Arbitration and Bankruptcy*, 40 The Business Lawyer 33 (1984) 15

Cited Authorities

Page

Ferriell, *Constitutionability of Bankruptcy Amendments and Federal Judgeship Act of 1984*, 64 Am. Bankr. L.J. 109 (1989) 14

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Gilmore & Black, Jr., *The Law of Admiralty* 76 (2d Ed. 1975) 2

Harwood, *Bankruptcy Arbitration and the Unwilling Debtor*, Dispute Resolution Journal, December, 1993, 28 (1993) 15

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Kreindler, *The Convergence of Arbitration and Bankruptcy*, 26 Arb. J. 34 (1971) 15

King, *Jurisdiction and Procedure under the Bankruptcy Amendments of 1984*, 38 Vand. L. Rev. 675 (1985) 14

Kurth, *Comment: An Unstoppable Mandate And An Immovable Policy: The Arbitration Act And The Bankruptcy Code Collide*, 43 UCLA L. Rev. 999 (1996) 15

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Page

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Neufeld, *Enforcement Of Contractual Arbitration Agreements Under The Bankruptcy Code*, 65 Am. Bankr. L.J. 525 (1991) 15

Tillet, *Enforcement of Pre-petition Contractual Arbitration Clauses in Bankruptcy: A Case Note on National Gypsum Co. v. NGC Settlement Trust & Asbestos Claims Management Corp.*, 50 Baylor L. Rev. 1041 (1998) 14

Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 Minn. L. Rev. 595 (1983) 15

Yochum, *Arbitration Agreements In Bankruptcy: A Mutant Is Loose (Again!), Symptoms Are Showing, A Palliative Is Suggested*, 19 Stetson L. Rev. 137 (1989) 15

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated, Decided And Filed November 1, 1999 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed May 5, 1998 ..... 25a

Appendix C — Opinion And Order Of The United States District Court For The Southern District Of New York Dated And Decided November 26, 1997 And Filed December 4, 1997 ..... 28a

Appendix D — Opinion And Order Of The United States District Court For The Southern District Of New York Dated And Decided August 16, 1996 And Filed August 19, 1996 ..... 48a

Appendix E — Memorandum Of Decision Of The United States Bankruptcy Court For The Southern District Of New York On Defendants' Motions To Dismiss And For Summary Judgment Dated And Decided July 1, 1994 And Filed July 5, 1994 ..... 73a

Appendix F — Relevant Constitutional And Statutory Provisions 138a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *United States Lines (S.A.) Reorganization Trust et al. v. American Steamship Owners Mutual P&I Assoc. Inc., et al.*, 197 F.3d 631 (2d Cir. 1999) (1a, "*USL IV*"). The opinions of the United States District Court for the Southern District of New York are reported at 220 B.R. 5 (S.D.N.Y. 1997) ("*USL III*") and 199 B.R. 465 (S.D.N.Y. 1996) ("*USL II*") (28a and 48a respectively) and that of the bankruptcy court is reported at 169 B.R. 804 (Bankr. S.D.N.Y. 1994) (74a) ("*USL I*").

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 1, 1999. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

Article I, Section 8, Article III, Sections 1 and 2, and Article VI (Section 2) of the Constitution. 138a-139a.

Treaties:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S 38 (1970), implemented by 9 U.S.C. § 201, *et seq.* (the "New York Convention" or "Convention"). 142a-145a.

Statutes:

The Federal Arbitration Act, 9 U.S.C. §§ 2, 3, 4, 201, 202, 203 and 206 (the "FAA"). 139a-145a.

The Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549, *et seq.* (1978) (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C., the "1978 Act") and The Bankruptcy Amendments and Federal Judgeship Act of 1984,

Pub. Law 98-353, 98 Stat. 333 (codified in part in 28 U.S.C. §§ 157 and 1334(b), the "1984 Act") (collectively, as subsequently amended, the "Bankruptcy Code"). 146a-149a.

STATEMENT OF THE CASE

The Trust commenced an adversary proceeding in the Bankruptcy Court seeking a declaratory judgment to establish the Trust's rights under certain pre-petition marine protection and indemnity insurance agreements ("the P&I Agreements"). The adversary complaint alleged jurisdiction under 28 U.S.C. § 157(a) and (b) and 28 U.S.C. § 1334(b). The Trust alleges it is the successor in interest to major shipowning companies which filed a Chapter 11 petition on November 24, 1986. 3a. Claims were filed in the bankruptcy case by Asbestos Claimants who allege that they sustained asbestos-related injuries while working on different ships in debtors' fleet over some forty years. 3a. The Trust asserts that its potential liability for these claims is covered by the P&I agreements. 3a. The Clubs provide marine indemnity, not liability, insurance.[1] Generally, a single club insured the debtor's fleet of ships for a particular policy year, but in some years ships were entered with more than one club. All of the P&I agreements were entered into before the debtors filed their bankruptcy petition in 1986. 3a. Because the P&I agreements provide indemnity coverage, all of the policies include requirements that the Trust must first pay and satisfy its liability for claims before coverage is triggered. 4a. The Trust has no liability at this stage to any of the Asbestos Claimants and, as a result, has no actual indemnity claims against the Clubs for any of the asbestos claims. The Trust merely seeks a declaration concerning rights under the P&I Agreements in respect of any potential obligation to indemnify the Trust should it ever have liability for any of the asbestos claims. 4a.

---

1. The foreign Clubs and the American Club are non-profit associations of shipowners who mutually insure one another against marine risks. *See* Gilmore & Black, Jr., *The Law of Admiralty* 76 (2d Ed. 1975).

The Clubs moved for summary judgment on a number of grounds, including that the suit was "non-core." The foreign Clubs also moved for a stay of the Trust's adversary complaint and an order compelling London arbitration under English law of the declaratory judgment issues pursuant to 9 U.S.C. §§ 3, 4 and 201, *et seq.* USL III, 43a, n.4. There is no question as to the existence and validity of the arbitration agreements in the P&I Agreements of the foreign Clubs. *See USL IV*, 13a. The Bankruptcy Court held that the relief requested by the Trust made the adversary proceeding a "core" matter under 28 U.S.C. §§ 157(b)(2)(A) and (O). *USL I*, 107a. The Bankruptcy Court further ruled that it had discretion to refuse to enforce the arbitration clauses in the P&I Agreements and that the circumstances of the case justified exercising this discretion. *USL I*, 118a.

The District Court reversed, holding that the adversary proceeding was non-core, and that no discretion existed to deny arbitration. *USL III*, 46a. An interlocutory appeal pursuant to 28 U.S.C. § 1292(b) to the Second Circuit was thereafter allowed. 25a-27a.

The Second Circuit reversed the district court's decision, holding that the adversary proceeding is core under the Bankruptcy Code. 6a-12a. The Second Circuit further ruled that, in a core proceeding, the Bankruptcy Court has discretion to annul the arbitration provisions in the P&I Agreements. 13a-16a. The Second Circuit, reviewing factual determinations only for clear error, finally ruled that it saw no basis for disturbing the Bankruptcy Court's exercise of its discretion to annul the arbitration agreements. 16a.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION THAT THIS IS A CORE BANKRUPTCY PROCEEDING IS IN CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT AND THE MAJORITY OF THE OTHER COURTS OF APPEALS AND CONCERNS AN IMPORTANT FEDERAL LAW QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. The Conflict With Decisions Of This Court

In *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court addressed the question of the constitutionality of non-Article III bankruptcy judges adjudicating a dispute concerning rights arising under non-bankruptcy law in a suit in bankruptcy court by debtor Northern against Marathon for alleged pre-petition breaches of contract and related counts. Marathon sought dismissal on the ground that the 1978 Act unconstitutionally conferred Article III judicial power upon judges lacking life tenure and protection against salary diminution. This Court affirmed dismissal of the suit, the plurality concluding that the 1978 Act's broad grant of jurisdiction to the bankruptcy courts was unconstitutional, *id.* at 87, and pointing out, "Private-rights disputes . . . lie at the core of the historically recognized judicial power . . . ," *id.* at 70. In response to appellants' argument that a discharge in bankruptcy is a "public right," it stated:

> . . . But *the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.* The former may well be a "public right," but the latter obviously is not. Appellant Northern's right to recover contract damages to augment its estate is

> "one of private right, that is, of the liability of one individual to another under the law as defined," *Crowell v. Benson*, 285 U.S., at 51.

Id. at 71-72. (emphasis added). The plurality went on to say:

> . . . Many of the rights subject to adjudication by the [1978] Act's bankruptcy courts . . . are not of Congress' creation. Indeed, the cases before us . . . involve a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court. Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III "adjunct," plainly must be deemed at a minimum . . .

Id. at 84 (original emphasis). Justices Rehnquist and O'Connor concurred in the judgment, *id.* at 89-92, describing Northern's lawsuit as one seeking damages for "counts which are the stuff of the traditional actions at common law . . . aris[ing] entirely under state law," which was "before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that court," *id.* at 90. They held the 1978 Act unconstitutional only insofar as it enabled "a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection . . . ," *id.* at 91, a holding providing the narrow ground of decision.

In response to *Northern Pipeline*, Congress passed the 1984 Act. As now codified at 28 U.S.C. § 157, the 1984 Act established two categories of proceedings: (1) core proceedings, which under §§ 157(b)(1) and (2) bankruptcy judges may "hear and determine," entering appropriate orders and judgments; and (2) non-core proceedings "otherwise related to a case under title 11," which under § 157(c)(1) a bankruptcy judge may only "hear," submitting proposed findings of fact and conclusions of law to the district court, which may consider both *de novo* and

is the only court which may enter a final order or judgment, 146a-148a. In § 157(b)(2) is a non-exclusive list of core proceedings including 13 specifically described proceedings plus two "catch-all" categories, *i.e.*:

> (A) matters concerning the administration of the estate; . . .
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(146a-148a).

After the 1984 Act, this Court has had no occasion to focus solely on the Article III constitutional issue in relation to bankruptcy. However, in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), this Court held that a person who has not filed a claim in a bankruptcy case has a Seventh Amendment right to a jury trial when sued by the bankruptcy trustee to recover an allegedly fraudulent monetary transfer, notwithstanding Congress' designation of fraudulent conveyance actions as "core proceedings" in 28 U.S.C. § 157(b)(H). On the closely related question of Article III jurisdiction, the five justice majority relied on *Northern Pipeline* and also on a subsequent non-bankruptcy decision, *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568 (1985). That reasoning is relevant here:

> In our most recent discussion of the "public rights" doctrine as it bears on Congress' power to commit adjudication of a statutory cause of action to a non-Article III tribunal, we rejected the view that "a matter of public rights must at a minimum arise 'between the government and others.' " *Northern Pipeline Construction Co., supra*, at 69 . . . We held, instead, that the Federal Government need not be a party for a case to revolve around "public rights." *Thomas v. Union Carbide*

Agricultural Products Co., 473 U.S. at 586; *id.*, at 596-599 (Brennan, J., concurring in judgment). The crucial question, in cases not involving the Federal Government, is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.*, at 593-594 . . . *If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court. . . .*

Although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions. In *Northern Pipeline Construction Co.*, 458 U.S., at 71, the plurality noted that the restructuring of debtor-creditor relations in bankruptcy "may well be a 'public right.' " But the plurality also emphasized that state-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. The plurality further said that "matters from their nature subject to 'a suit at common law or in equity or admiralty' " lie at the "protected core" of Article III judicial power, *id.*, at 71, n. 25; see *id.*, at 90 (Rehnquist, J., concurring in judgment) — a point we reaffirmed in *Thomas, supra*, at 587. There can be little doubt that fraudulent conveyance actions by bankruptcy

> trustees — suits which, we said in *Schoenthal v. Irving Trust Co.*, 287 U.S., at 94-95 (citation omitted), "*constitute no part of the proceedings in bankruptcy but concern controversies arising out of it*" — *are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.* [Citation omitted.] They therefore appear matters of private rather than public right.

Id. at 54-56, footnotes omitted (emphasis added).[2]

The Second Circuit decision here consists of three concurring opinions. In the principal opinion, Judge Walker refers to both *Northern Pipeline* and *Thomas* and Congress' minimal authority to assign to a non-Article III court adjudication of a right not of its creation (in *Northern Pipeline* a state law right), "a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court." 8a. However, Judge Walker failed to follow that teaching, instead stating and applying a different test, *i.e.*, that "whether a contract proceeding is core depends on (1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the *proceeding* is independent of the reorganization." 8a (Emphasis added). The second part of his test significantly departs from *Northern Pipeline*, which refers to whether the *right* is independent of the reorganization, *id.* at 84, not whether the *proceeding* (i.e., the adversary proceeding) is independent of the

---

2. Justice Scalia, concurring in the judgment, would have limited public rights still more narrowly than the majority, by ruling that the public rights doctrine required, at a minimum, that the United States be a party to the adjudication. *Id.* at 65-71.

reorganization. Having stated a test in conflict with *Northern Pipeline,* Judge Walker applied it, ultimately concluding:

> Thus the declaratory proceedings brought by the Trust in this case directly affect the bankruptcy court's core administrative function of asset allocation among creditors, and for that reason they are core.

(12a).

Although recognizing that an earlier Second Circuit decision, *In re Orion Pictures Corp.*, 4 F.3d 1095 (2d Cir. 1993), *cert. dismissed*, 511 U.S. 1026 (1994), had [correctly] held to be non-core a trustee's action for anticipatory breach of a pre-petition contract triggered by a post-petition event involving a $77 million potential debt which would have eased estate administration and liquidation, Judge Walker distinguished it by simply stating, "Resolving the disputes over the P&I policies here has a much more direct impact on the core administrative functions of the bankruptcy court." 10a-11a. To support that conclusion, he discussed theoretical difficulties due to the circumstance that the debtors had P&I agreements requiring that they, and their successor Trust, pay claims prior to reimbursement. 11a-12a. He therefore concluded that a declaratory judgment is required to clarify the parties' rights, but gives no reason why such a declaratory proceeding should be core other than to say that it directly affects the administrative function of asset allocation among creditors (12a), evidently referring to §§ 157(b)(2)(A) and (O), *supra*, 6. However, the proceeding clearly does not directly affect such an asset allocation. The proceeding might theoretically have an *indirect* effect by augmenting funds available to pay some potential claims against the estate, but as such would be a § 157(c)(1) "otherwise related" non-core proceeding. It certainly does not meet this Court's descriptions of core bankruptcy power, "the restructuring of debtor-creditor relations" and "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," *supra,* 4 and 8. Instead, the adversary

proceeding concerns only the Trust's rights against indemnity insurers. Judge Walker's approach "would swallow the [*Northern Pipeline*] rule," *see Orion*, 4 F.3d at 1102. He states and applies a rule, and reaches a result, in clear conflict with *Northern Pipeline* and *Granfinanciera* (holding a trustee's fraudulent conveyance action non-core), *supra*.

Judge Newman concurred in the result, but advocated "a bright-line rule that treats as core proceedings all suits alleging post-petition breaches of pre-petition contracts" (18a), reasoning:

> The post-petition [alleged] breach creates a cause of action that is an asset of the bankruptcy estate, distinct from the contractual rights arising from the pre-petition contract. In [*Northern Pipeline's*] terms, the cause of action for a post-petition breach is not "antecedent to the reorganization petition . . ."

(21a). Such reasoning fallaciously relies on treating the "cause of action" as the relevant "right," rather than the truly relevant "rights" referred to in *Northern Pipeline*, *i.e.*, contract rights "independent of and antecedent to the reorganization petition," *id.* at 84, which the cause of action would merely seek to enforce. It is the contract rights which are relevant to the core inquiry, not the derivative "right" of "a cause of action." Under *Northern Pipeline* such contract rights must be adjudicated by an Article III court. Under Judge Newman's analysis they never would be, and thus his opinion also conflicts with *Northern Pipeline*.

Judge Calabresi similarly concurred with Judge Walker's opinion except that part "indicating that whether a lawsuit alleging a post-petition breach of a pre-petition contract depends on the impact the contract has on core bankruptcy functions," 23a, *i.e.*, the main thrust of Judge Walker's opinion. He favored Judge Walker's case-by-case approach over Judge Newman's proposed bright-line rule, but thought

it unnecessary to resolve that issue, because he had no doubt (for unstated reasons) "that this particular post-petition breach of a pre-petition contract is core." 24a.

In summary, all three opinions and the decision itself are in clear conflict with *Northern Pipeline*, as reinforced by *Granfinanciera*, on the important constitutional issue of a bankruptcy court's core jurisdiction, and certiorari should be granted on that ground.

B. The Conflict With The Majority Of The Other Courts of Appeals

The Third Circuit has concluded that a trustee's adversary proceeding to recover rents under pre-petition leases, allegedly breached both before and after the filing of the petition, was entirely a non-core matter. *Beard v. Braunstein*, 914 F.2d 434 (3d Cir. 1990). *See also Hays & Co. v. Merrill Lynch*, 885 F.2d 1149, 1156, n.9 (3d Cir. 1989); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1234-35 (3d Cir. 1994).

The Fourth Circuit very recently held that a debtor's action to recover disputed late payment penalties from a shipper was non-core, reversing the lower courts which had held it core under 28 U.S.C. §§ 157(b)(2)(A)(E) and (O). *In re Apex Exp. Corp.*, 190 F.3d 624 (4th Cir. 1999). Recognizing that courts are split on the issue, *id.* at 631, it discussed this Court's decisions in *Northern Pipeline, Thomas, and Granfinanciera, supra*, as well as *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), concluding that the dispute was private, had only a "theoretical and indirect impact on the public act of debt restructuring," and must be treated as non-core, *id.* at 631-32, even though federal rather than state law governed the contract rights. *Id.* at 633.

The Fifth Circuit has held an action against debtors and a third party for wrongful appropriation of corporate assets to be a non-core, related proceeding, holding:

> . . . a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature could arise only in the context of a bankruptcy proceeding.

In re Wood, 825 F.2d 90, 97 (5th Cir. 1987). This proceeding is in neither category.

The Seventh Circuit is in accord with the Fifth Circuit. *Barnett v. Stern*, 909 F.2d 973 (7th Cir. 1990), expressly approved and followed the above-quoted holding in *In re Wood*, *supra*, *id.* at 981. *See also*, *Diamond Mortg. Corp. of Illinois v. Sugar*, 913 F.2d 1233, 1239 (7th Cir. 1990); *In re U.S. Brass Corp.*, 110 F.3d 1261 (7th Cir. 1997), where, dealing with the debtor Eljer's federal court diversity suit seeking to establish insurance coverage, the Court reasoned:

> . . . these insurance cases are noncore. *Core proceedings are actions by or against the debtor that arise under the Bankruptcy Code in the strong sense that the Code itself is the source of the claimant's right or remedy, rather than just the procedural vehicle for the assertion of a right conferred by some other body of law, normally state law.* See 28 U.S.C. § 157(b)(2); . . . [other citations omitted] . . . Eljer's claimed right to insurance coverage is a creation of state contract law and one that could be vindicated in an ordinary breach of contract suit if Eljer were not a bankrupt. The fact that it is an *important right* to the bankrupt — Eljer claims to be seeking $500 million in insurance coverage — is irrelevant . . . [citation omitted] . . . "Core" is a defined term in the Bankruptcy Code, a term of art, rather than a metaphor. The impact of a claim on the size of the debtor's estate is a criterion of whether a claim is related to the bankruptcy and is therefore a noncore proceeding . . . [citations omitted] . . . *So Eljer has it backwards — arguing*

> *for classification as a core proceeding on the basis of a criterion for classification as a noncore proceeding.*

Id. at 1268-69; first and last emphasis added. Here, as in *U.S. Brass,* the Bankruptcy Code is not the source of the rights to be determined by the adversary proceeding and the Second Circuit erred in a way similar to Eljer.

The Ninth Circuit is also in conflict with the Second Circuit decision herein. In *In re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1986), the Court affirmed a district court order holding *inter alia* that the bankruptcy court did not have jurisdiction to determine a debtor's state law contract counterclaims asserted in a relief from stay proceeding before the creditor filed proof of claim, holding the counterclaims non-core and stating:

> . . . Accordingly, *we hold that state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-(N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, sections § 157(b)(2)(A) and (O).* To hold otherwise would allow the bankruptcy court to enter final judgments that this court has held unconstitutional. Since we find the case before us a "related proceeding," the district court was correct in ruling that the bankruptcy court had no jurisdiction to enter judgment. 28 U.S.C. § 157(c)(1).

Id. at 162; emphasis added. Similarly here, the contract claims do not specifically fall within the (B)-(N) categories and are related proceedings.

The Eleventh Circuit is in accord with the Fifth. *See In re Davis*, 899 F.2d 1136 (11th Cir. 1990), following and quoting from *In re Wood, supra*, thus,". . . If the proceeding does not

involve a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding . . .". *Id.* at 1140-41.

The significant conflict between the Second Circuit and the other circuits as to the core/non-core criteria is the second reason why this Court should address and decide this important jurisdictional question.

C. The Core/Non-Core Issue Has Not Been, But Should Be, Settled By This Court In View Of The Lower Courts' Difficulties In Resolving It

This Second Circuit decision, with three different opinions, is strikingly emblematic of the lower courts' continuing difficulty and uncertainty in constitutionally dealing with the core/non-core categories in the 1984 Act — a state of affairs that has long inspired concern. *See* King, *Jurisdiction and Procedure under the Bankruptcy Amendments of 1984*, 38 Vand. L. Rev. 675, 686-695 (1985); Ferriell, *Core Proceedings in Bankruptcy Court*, 56 UMKC L. Rev. 47, 114-115 (1987), and *Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 Am. Bankr. L.J. 109, 110, 113, 196-197 (1989); Flaxer, *Bankruptcy Court Power to Adjudicate Contract Disputes*, 2 Am. Bankr. Inst. L. Rev. 369, 398-399 (1994); C. Tillet, *Enforcement of Pre-petition Contractual Arbitration Clauses in Bankruptcy: A Case Note on National Gypsum Co. v. NGC Settlement Trust & Asbestos Claims Management Corp.*, 50 Baylor L. Rev. 1041, 1062 (1998); E. Chemerinsky, *Federal Jurisdiction* (3d Ed. 1999) § 4.5.3, at 250-251 (noting that the National Bankruptcy Review Commission's 1997 report states "[t]he core/non-core distinction has created a judicial system . . . that is time consuming, unnecessarily expensive, and inefficient,") and, at 256 (". . . the current state of the law concerning use of legislative courts for private law . . . remains complicated and confused . . ."). This case provides a most appropriate occasion for this Court to resolve constitutionally the core/non-core confusion, which is the third compelling reason for granting certiorari on this question.

II.

THE SECOND CIRCUIT'S RULING THAT THE BANKRUPTCY COURT IN A CORE PROCEEDING HAS DISCRETION TO ANNUL OTHERWISE VALID FOREIGN ARBITRATION AGREEMENTS BRINGS TO A HEAD THE CLASH BETWEEN ARBITRATION AND BANKRUPTCY

A. The Second Circuit's Ruling Conflicts With Decisions Of This Court

Consideration by the Court of the clash of the FAA and the Bankruptcy Code has been long heralded.[3] The Second Circuit itself recognized:

> Thus, there will be occasions where a dispute involving both the Bankruptcy Code, 11 U.S.C. §101 *et seq.*, and the Arbitration Act, 9 U.S.C. §1 *et seq.*, "presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution."

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3. Kurth, *Comment: An Unstoppable Mandate And An Immovable Policy: The Arbitration Act And The Bankruptcy Code Collide*, 43 UCLA L. Rev. 999 (1996); Harwood, *Bankruptcy Arbitration and the Unwilling Debtor*, Dispute Resolution Journal, December, 1993 at 28 (1993); Neufeld, *Enforcement Of Contractual Arbitration Agreements Under The Bankruptcy Code*, 65 Am. Bankr. L.J. 525 (1991); Yochum, *Arbitration Agreements In Bankruptcy: A Mutant Is Loose (Again!), Symptoms Are Showing, A Palliative Is Suggested*, 19 Stetson L. Rev. 137 (1989); Markason, *Bankruptcy Law - Arbitration Agreements in Bankruptcy Proceedings: The Clash Between Policies and The Proper Forum For Resolution — Zimmerman v. Continental Airlines, Inc.*, 57 Temple L. Q. 855 (1984); Deitnick, *The Conflicting Policies Between Arbitration and Bankruptcy*, 40 The Business Lawyer 33 (1984); Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 Minn. L. Rev. 595 (1983); Kreindler, *The Convergence of Arbitration and Bankruptcy*, 26 Arb. J. 34 (1971).

> *Societe National Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp.*, ["*Distrigas*"], 80 B.R. 606, 610 (D. Mass. 1987).

USL IV, 15a.

The *Distrigas* court noted that "the Supreme Court has not yet specifically addressed the clash of bankruptcy and international arbitration. . . ." 80 B.R. at 613. *See also In re Dollar Corporation*, 139 B.R. 192, 197 (Bankr. E.D. Mich. 1992) (". . . This issue may even be subject to Supreme Court review given the importance of international arbitration in a bankruptcy context and the fact that the Supreme Court has yet to address this issue in that context."). That remains true today. In deciding that a bankruptcy judge may exercise discretion to annul an otherwise valid arbitration agreement, the Second Circuit has now decided this important question in a way that conflicts with decisions of this Court, other circuit courts and the Supremacy Clause, Article VI, of the Constitution. 139a. Even in a core proceeding there is no valid reason to give a bankruptcy judge discretion to sweep away rights to arbitrate which were bargained for long before the bankruptcy. There is no reason to suppose that an arbitration will take any longer than the litigation of an adversary proceeding in a courtroom nor is there just reason to believe that requiring an arbitration would adversely impact on a debtor's estate any more than ordinary litigation. Yet, these are the principal reasons given by the Second Circuit for issuing an extraordinary ruling which undermines the FAA, and New York Convention, in any case where the Bankruptcy Court considers an arbitration clause to be an obstacle to the efficient administration of the proceedings before it. *USL IV*, 12a.

This Court has rejected judicially created exceptions to the mandate of the FAA despite lower courts' findings of a "contrary federal interest sufficiently compelling to outweigh the mandate of the Arbitration Act. . . ." *Dean Witter Reynolds Inc. v. Byrd*,

("*Byrd*") 470 U.S. 213, 219 (1985).[4] In *Byrd*, 470 U.S. at 221, the Court stated that the policy underlying the FAA "requires that we rigorously enforce agreements to arbitrate," even if that results in separate proceedings in different fora. The Court further stated:

> By its terms, the [Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. [9 U.S.C.] §§ 3, 4 [emphasis in original]

346 U.S. at 218. *See also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) ("[9 U.S.C.] Section 2 is a congressional declaration of a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

This policy is felt most forcefully in international commercial agreements. The majority in *Scherk v. Alberto-Culver Co.*, ("*Scherk*") 417 U.S. 506, 519-20 n.15 (1974) stated:

> Our conclusion today is confirmed by international developments and domestic legislation [citing the New York Convention] . . .
>
> * * *
>
> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to

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4. In *Shearson/American Exp. Inc. v. McMahon*, 482 U.S. 220, 226 (1987), for example, the Court held that Securities Exchange Act and RICO treble-damage claims were arbitrable and that "a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement."

> arbitrate are observed and arbitral awards are enforced in signatory countries. [citations omitted]
>
> * * *
>
> Without reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country's adoption and ratification of the Convention . . . provide strongly persuasive evidence of congressional policy consistent with the decision we reach today.

Similarly, the Court held in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, ("*Mitsubishi Motors*") 473 U.S. 614, 629 (1985):

> As in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming a contrary result would be forthcoming in a domestic context.* [emphasis added].

See also Vimar Seguros y Reaseguros, S.A. v. M.V. Sky Reefer, 515 U.S. 528 (1995) (FAA reflects strong, well-established policy in favor of arbitration); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum selection clause).

The Second Circuit's decision reflects a "parochial refusal by the court[s] of one country to enforce an international arbitration agreement" in conflict with the above decisions and the "unified" standards for application of the New York Convention that the Court has recognized. *Scherk*, 417 U.S. at 516.

B. The Second Circuit's Decision To Provide A Discretion To The Bankruptcy Courts Creates A Conflict Among The Circuits

The Second Circuit's decision is in conflict with that of the Third Circuit in *Hays & Co. v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, ("*Hays*"), 885 F.2d 1149 (3d Cir. 1989), and with several others on the same issue. In *Hays*, the Third Circuit stated that "the Bankruptcy Code, as amended, does not conflict with the Arbitration Act so as to permit a District Court to deny enforcement of an arbitration clause in a non-core adversary proceeding brought by the trustee in a District Court." 885 F.2d at 1150.[5] The Third Circuit thereby established a "*per se* rule" in domestic arbitration that no discretion exists in non-core adversary proceedings brought by a debtor to deny arbitration and no discretion exists unless a "subsequent enactment specifically gives discretion." *Id.* This conclusion was underscored by the Third Circuit's statement in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1116

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5. The court further stated:

> Under *McMahon*, the district court will never have discretion in deciding whether to enforce an arbitration clause under the Arbitration Act because if the subsequent act does supercede the Arbitration Act, the court will be bound to follow the direction of that subsequent enactment. *Only if the subsequent enactment specifically gives discretion to the District Court in determining whether to order arbitration would there be discretion for the court to exercise.*

Hays, 885 F.2d at 1157 n.10 (emphasis added).

(3d Cir. 1993) that "[a] District Court lacks discretion to deny enforcement of arbitration clause in [a] non-core proceeding brought by bankruptcy trustee."

The Second Circuit's decision is also in conflict with the Fifth Circuit which, in *In re National Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997), also rejected the core/non-core distinction for existence of a discretion, but recognized a discretion based on the "underlying nature of the proceeding, *i.e.*, whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the Code."

The Second Circuit's decision is also in direct conflict with those of the Eighth Circuit and Ninth Circuit Bankruptcy Appellate Panel. In *In re Hart Ski Manufacturing Co.*, ("*Hart*") 18 B.R. 154 (Bankr. D. Minn. 1981), *amended* 22 B.R. 762 (Bankr. D. Minn. 1982), *aff'd*, 22 B.R. 763 (C.D. Minn. 1982), *aff'd*, 711 F.2d 845 (8th Cir. 1983) a creditor, who had filed a proof of claim, moved to dismiss the debtor's adversary complaint for breach of contract and to obtain a stay pending arbitration, pursuant to 9 U.S.C. § 3. The bankruptcy court, in dismissing the debtor's claim without prejudice and ordering arbitration and issuing a stay, enunciated the standard "[i]n applying the federal law under the [Arbitration Act], the court must focus on the single question of whether or not there was an agreement on the clause in the contract providing for arbitration." *Hart*, 18 B.R. at 158. That decision was affirmed by both the District Court and the Eighth Circuit, thus requiring debtor to arbitrate the creditor's claim and its own $13 million counterclaim, according to the procedures of the International Chamber of Commerce, under German law.

In *Bender Shipbuilding & Repair Co. v. Morgan*, 28 B.R. 3, 5 (9th Cir. B.A.P. 1983) the Court held:

> A reorganization debtor-in-possession is bound by the mandatory arbitration provisions contained in a contract where he makes a claim arising out of that

> contract against a non-creditor. *Schilling v. Canadian Foreign S.S. Co. Ltd.*, 190 F. Supp. 462 (S.D.N.Y. 1961).

The Second Circuit's decision also creates an apparent conflict with the Seventh Circuit which has said no discretion exists, albeit not in the specific context of a conflict between the FAA or New York Convention and the Bankruptcy Code. As stated by the Seventh Circuit in *C. Itoh & Co. (America) Inc. v. Jordan International Co.*, 552 F.2d 1228 (7th Cir. 1977):

> Considerations of judicial economy bear no relation to the making and performance of an agreement to arbitrate, and to permit a district court to deny a stay pending arbitration based on such discretionary considerations would, in our opinion, frustrate the strong federal policy in favor of arbitration which is expressed in the Federal Arbitration Act as interpreted by the Supreme Court.

Numerous other Courts of Appeals have also held that the FAA and New York Convention provide no discretionary basis for avoiding their application. *See McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974) ("[t]here is nothing discretionary about [A]rticle II (3) of the [New York] Convention."); *Sedco*, 767 F.2d at 1151 ("9 U.S.C. § 6 does not confer discretion in compelling arbitration."); *I.T.A.D. Associates, Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981) (". . . 9 U.S.C. § 206 does not . . . confer discretion in compelling arbitration."); *see also Aasma et al. v. American S. S. Owners Mutual Protection & Indemnity Association, Inc.*, 95 F.3d 400, 405 (6th Cir. 1996) (MALC claimants asserting right of direct action under debtor's protection and indemnity insurance provided by West of England required to arbitrate in England because "there is no valid policy reason to ignore the explicit language of the contract or to contrive a set of legal fictions to avoid its purpose.").

As the Court also observed in *Byrd*, 470 U.S. at 217, "the Sixth, Seventh and Eighth Circuits have held that the Arbitration Act divests the district courts of any discretion regarding arbitration in cases containing arbitrable and nonarbitrable claims, and instead requires that the courts compel arbitration of arbitrable claims, when asked to do so."[6]

C. The Second Circuit's Decision Undermines The United States' Obligations Under The New York Convention

The New York Convention is, as the Second Circuit recognized in *Victrix S.S. Co. S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 712 (2d Cir. 1987), "a treaty of the United States" and "[t]he obligations of the United States under the Convention would be undermined if they are not determined by a uniform body of federal law." In this respect the Fifth Circuit, in *Sedco v. Petroleos Mexicanos Mexican National Oil Company*, 767 F.2d 1140, 1145 (5th Cir. 1985) observed that the "[t]he [New York] Convention was negotiated pursuant to the Constitution's Treaty power" and that in failing to enforce it the United States would be "violating its Treaty obligations with 65 nations." 767 F.2d at 1149. The New York Convention is therefore entitled to the respect afforded it by Article VI of the Constitution as the "supreme Law of the Land." *See also Filanto S.p.A. v. Chilewich Intern. Corp.*, 789 F. Supp. 1229, 1236 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993) (". . . whether these parties agreed to arbitrate their disputes is governed by the [New York] Arbitration Convention and its implementing legislation. That Convention, as a treaty, is the supreme law of the land, U.S. Const. Article VI cl. 2, and controls **any** case in any American court falling within its sphere of application. [Emphasis in original]").

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6. The decisions referred to are *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981); *Surmon v. Merrill, Lynch Pierce, Fenner & Smith, Inc.*, 733 F.2d 59 (8th Cir. 1984); *Liskey v. Oppenheimer & Co.*, 717 F.2d 314 (6th Cir. 1983).

Accordingly, rules of construction applicable to treaties must be employed in divining a "contrary federal interest." In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) the Court stated:

> There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous Congressional action. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States*, 288 US 102, 120, 77 L.Ed 641, 53 S.Ct. 305 (1933). [other citations omitted]

The later enactment and subsequent amendments of the Bankruptcy Code provide no basis for finding that Congress has "clearly expressed" an exception to the Convention which authorizes a bankruptcy judge to annul a valid arbitration clause in a pre-petition contract. There is nothing in the plain language of the Bankruptcy Code or its legislative history which justifies the extraordinary grant of power the Second Circuit has bestowed on bankruptcy judges to sweep away a bargained-for contract right to arbitrate disputes.[7]

7. To the contrary, certain district courts have been given express statutory "authorization" to order arbitration in civil adversary actions, if the parties consent. 28 U.S.C. § 652. Section 26 of Bankruptcy Act of 1947, Pub. L. No. 80-282, 61 Stat. 669 (1947) (former 11 U.S.C. § 49) contained a provision permitting the trustee to require arbitration, subject to court approval, of "any controversy arising in the settlement of the estate" despite the absence of any such agreement. The provision was originally dropped from the Bankruptcy Code. The Judicial Improvements & Access to Justice Act, Pub. L. No. 100-702 (as amended Pub. L. 103-192, 107 Stat. 2292) enacted on November 19, 1988 and subsequently extended, provided statutory authorization for consensual arbitration programs in certain district courts of any civil actions, including adversary proceedings in bankruptcy. 28 U.S.C. § 651. The Committee on the Judiciary's Report stated that "[a]lternative forms of dispute resolution, such as arbitration, should be recognized and encouraged by the Congress." H.R. Rep. No. 100-889, 100th Cong., 2nd Sess., U.S. Code Cong. & Admin. News, (1988) Vol. 7 at 5983.

In *Murray v. The Charming Betsy*, 2 Cranch 64, 117-118, 2 L. Ed. 208 (1804), Chief Justice Marshall wrote that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." Accordingly, even if a discretion exists to annul domestic arbitration agreements, the Second Circuit acted improperly in construing the Bankruptcy Code to provide an exception for foreign arbitration agreements neither contained in the treaty itself nor the statutory ratification of it nor "clearly expressed" by any subsequent Congressional action.

The Second Circuit's decision creates a "dicey atmosphere of . . . a legal no-man's land . . . [which will] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Scherk*, 417 U.S. at 517. Indeed, the implied "discretionary" exception created by the Second Circuit will undermine the entire rationale of the New York Convention of providing "unified" standards for recognition and enforcement of arbitration agreements and "invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 517.

Mitsubishi Motors made clear that any "exception" to applying the New York Convention must be "expressly" stated by Congress. Justice Blackmun wrote, in respect of "subordinat[ing] domestic notions of arbitrability to the international policy favoring commercial arbitration," 473 U.S. at 639:

> The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own. Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention. But we decline

> to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.

473 U.S. at 639 n.21.

Similarly, in the domestic context, in *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, ("*Midlantic*") 474 U.S. 494 (1986) the Court considered whether the Bankruptcy Code, 11 U.S.C. § 554(a), empowered a trustee to abandon toxic wastes in contravention of state environmental protection laws. The majority held that the Bankruptcy Code's abandonment authorization did not pre-empt pre-1978 limitations on a trustee's abandonment power which had been developed by judicially developed doctrine. 474 U.S. at 501. The majority's reasoning in *Midlantic* has equal application to the Second Circuit's decision that the Bankruptcy Code preempts the New York Convention, as well as the FAA:

> . . . The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Edmonds v Compagnie Generale Transatlantique*, 443 US 256, 266-267, 61 L.Ed 2d 521, 99 S Ct 2753 (1979). The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swarts v Hammer*, 194 US 441, 444, 48 L Ed 1060, 24 S Ct 695 (1904); see *Palmer v Massachusetts*, 308 US 79, 85, 84 L Ed 93, 60 S Ct 34 (1939) ("If this old and familiar power of the states [over local railroad service] was withdrawn

> when Congress gave District Courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change").

474 U.S. at 501.

The Second Circuit's decision has "so far departed from the accepted and usual course of judicial proceedings," Rule 10, in deferring to treaties as the "supreme Law of the Land" that the Court should exercise its supervisory power to grant a writ of certiorari to ensure that the United States complies with its obligations to the other nation signatories to the New York Convention.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED AND FILED NOVEMBER 1, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1998

(Argued January 25, 1999 Decided NOV 1 1999)

Docket No. 98-5029

In re UNITED STATES LINES, INC. and UNITED STATES LINES (S.A.) INC. F/K/A/ Moore McCormack Lines, Inc.,

Debtors,

UNITED STATES LINES, INC. and UNITED STATES LINES (S.A.) INC., REORGANIZATION TRUST,

Plaintiff-Appellee-Appellant,

ASBESTOSIS CLAIMANTS,

Plaintiff-Intervenor-Appellant,

— v. —

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., WEST OF ENGLAND OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC. and CONTINENTAL INSURANCE CORPORATION,

Appendix A

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (Bermuda) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON MUTUAL STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, MARINE OFFICERS OF AMERICA CORP., and THE TRAVELERS INSURANCE COMPANY,

Defendants-Appellants-Appellees.

Before: NEWMAN, WALKER, and CALABRESI, *Circuit Judges*.

* * *

WALKER, *Circuit Judge*:

The United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust (the "Trust") sued in the Bankruptcy Court for the Southern District of New York (Francis G. Conrad, *Bankruptcy Judge*) seeking a declaratory judgment to establish the Trust's rights under various insurance contracts. The bankruptcy court held that the action was within its core jurisdiction and denied the defendants' motion to compel arbitration of the proceedings. The District Court for the Southern District of New York (Sidney H. Stein, *District Judge*), reversed and held that the insurance contract disputes were not core proceedings. After ordering arbitration to go forward, the district court certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We now reverse and remand.

Appendix A

BACKGROUND

The facts pertinent to this appeal are fully set forth in the extensive opinions of the bankruptcy court, *see United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Ass'n*, 169 B.R. 804, 809-11 (Bankr. S.D.N.Y. 1994) ("U.S. Lines I"), and the district court, *see United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Ass'n*, 220 B.R. 5, 7-8 (S.D.N.Y. 1997) ("U.S. Lines II"). We assume familiarity with both, and will only summarize the pertinent facts here. On November 24, 1986, United States Lines, Inc. and United States Lines (S.A.) Inc., as debtors, filed a voluntary petition for bankruptcy relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. The Trust is their successor-in-interest pursuant to a plan of reorganization that was confirmed by the bankruptcy court on May 16, 1989.

Among the creditors are some 12,000 employees who have filed more than 18,000 claims, most of which are for asbestos-related injuries sustained while sailing on different ships in debtors' fleet over four decades. Many additional claims are expected to mature in the future. The Trust asserts that these claims are covered by several Protection & Indemnity insurance policies (the "P&I policies") issued by four domestic and four foreign mutual insurance clubs ("the Clubs"). Generally, a single club insured the debtors' entire fleet for a particular year, but there were exceptions when certain ships where insured independently of fleet coverage by another club or under a different policy. All of the P&I policies were issued before the debtors petitioned for bankruptcy relief.

Appendix A

The proceeds of the P&I policies are the only funds potentially available to cover the above employees' personal injury claims. At the heart of each of the P&I policies is a pay-first provision by which the insurers' liability is not triggered until the insured pays the claim of the personal injury victim. The deductibles for each accident or occurrence vary among the different policies, ranging from $250 to $100,000.

On December 8, 1992, the Bankruptcy Court entered a stipulation of conditional settlement between the Trust and an initial group of 106 claimants, and on January 5, 1993, the Trust began this action as an adversarial proceeding in bankruptcy, pursuant to 28 U.S.C. § 2201, seeking a declaratory judgment of the parties' respective rights under the various P&I policies. Nine of the ten counts in the complaint seek a declaration from the court of the Clubs' contractual obligations under the P&I policies in light of the stipulation of conditional settlement. The tenth claim seeks punitive damages for creating an "insurance maze."

The bankruptcy court held, *inter alia*, that the Trust's declaratory judgment action was "core," *U.S. Lines I*, 169 B.R. at 821, and thus could be tried to binding judgment in the bankruptcy court, and that the bankruptcy court had discretion to deny the motion to compel arbitration filed by the four foreign Clubs, *see id.* at 825. The district court, exercising appellate jurisdiction, reversed both determinations and, on November 26, 1997, entered an order remanding to the bankruptcy court for further proceedings. *See U.S. Lines II*, 220 B.R. at 11, 13. On March 4, 1998, the district court entered an order certifying its November 26,

1997 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we accepted the appeal.

DISCUSSION

I. Jurisdiction

At the outset, the Clubs argue that we only have jurisdiction to hear the question identified as controlling by the district court, namely its "determination that the adversary action in this case is not a 'core' proceeding pursuant to 28 U.S.C. § 157(h)," *see United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Ass'n.*, No. 85-civ. 3175 (S.D.N.Y. March 4, 1998), and not whether arbitration was properly ordered. We disagree.

The Supreme Court has held that under 28 U.S.C. § 1292(b) appellate jurisdiction, "the appellate court may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (citation and quotation marks omitted); *Isra Fruit Ltd. v. Agrexco Agric. Export Co.*, 804 F.2d 24, 25 (2d Cir. 1986). Because the district court's order determined whether the Trust's action was core and whether the bankruptcy court has discretion to stay arbitration, both issues are before us.

Appellees also argue, in the alternative, that pursuant to 9 U.S.C. § 16(b) arbitrability may not be considered on this interlocutory appeal, because it is not independent of the core/non-core issue. That argument misconstrues the law.

Appellees are correct that the arbitrability issue is "embedded" in the lawsuit seeking a declaration of coverage. The limited exception to the prohibition against interlocutory appeals of an order to arbitrate where the arbitrability issue is "independent" and not "embedded" is therefore unavailing. *See Ermenegildo Zegna Corp. v. Zegna, S.p.A.*, 133 F.3d 177, 181 (2d Cir. 1998); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). But the issue may be properly considered by us for another reason. Section 16(b) only prohibits arbitrability from being considered in most interlocutory appeals "[e]xcept as otherwise provided in section 1292(b) of title 28." 9 U.S.C. § 16(b). This appeal is before us by virtue of 28 U.S.C. § 1292(b), and therefore the Arbitration Act does not prohibit us from determining the arbitration issue, even though it is not independent of the core/non-core issue.

We therefore have jurisdiction to determine both whether the proceedings are "core" and whether the bankruptcy court has discretion to enjoin arbitration. We will consider each in turn.

II. Whether the Declaratory Judgment Action is "Core"

The Bankruptcy Code divides claims in bankruptcy proceedings into two principal categories: "core" and "non-core." *See* 28 U.S.C. § 157. "Bankruptcy judges have the authority to 'hear and determine all . . . core proceedings arising under title 11 . . . and may enter appropriate orders and judgments, subject to review under section 158 of [title 28.]' " *S.G. Phillips Constructors, Inc. v. City of Burlington (In re S.G. Phillips Constructors, Inc.)*, 45 F.3d 702, 704

(2d Cir. 1995) (quoting 28 U.S.C. § 157(b)(1)). With respect to non-core claims, unless the parties otherwise agree, the bankruptcy court can only recommend findings of fact and conclusions of law to the district court. *See id.* In this case the bankruptcy court held that the Trust's declaratory judgment action was a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the district court held that it was non-core. We review the latter ruling *de novo*. *See Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1388 (2d Cir. 1990). Unlike the district court, we conclude that the bankruptcy court has core jurisdiction over the proceedings.

The origin of the core/non-core distinction is found in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Supreme Court struck down provisions of the 1978 Bankruptcy Act that vested authority in Article I bankruptcy courts to hear cases that, absent the parties' consent, constitutionally could only be heard by Article III courts — so-called "non-core" proceedings. The four-member plurality emphasized that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages." *Marathon*, 458 U.S. at 71. We have held that "core proceedings" should be given a broad interpretation that is "close to or congruent with constitutional limits" as set forth in *Marathon*, and that *Marathon* is to be construed narrowly. *Resolution Trust Corp. v. Best Prods. Co., Inc. (In re Best Prods. Co.)*, 68 F.3d 26, 31 (2d Cir. 1995) (quoting *Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 168 (1st Cir. 1987)).

Appendix A

The principal holding of *Marathon* is that Congress has minimal authority to control the manner in which "a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court" may be adjudicated. *Marathon*, 458 U.S. at 84; *see id.* at 90 (Rehnquist, J., concurring) ("the lawsuit . . . seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law"); *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) ("[*Marathon*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.").

Therefore, under *Marathon*, whether a contract proceeding is core depends on (1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization. The latter inquiry hinges on "the nature of the proceeding." *In re S.G. Phillips Constructors, Inc.*, 45 F.3d at 707. Proceedings can be core by virtue of their nature if either (1) the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings, *see, e.g.*, *id.* at 706 (claim allowance), or (2) the proceedings directly affect a core bankruptcy function, *see, e.g.*, *In re Best Prods. Co.*, 68 F.3d at 31 (contractual subordination agreements affecting priority of claims). Core bankruptcy functions of particular import to the instant proceedings include "[f]ixing the order of priority of creditor claims against a debtor," *id.*, " 'plac[ing] the property of the bankrupt, wherever found, under the

control of the court, for equal distribution among the creditors,' " *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 91 (2d Cir. 1988) (quoting *Straton v. New*, 283 U.S. 318, 320-21 (1931)), and "administer[ing] all property in the bankrupt's possession," *Straton*, 283 U.S. at 321.

We now turn to the question of whether the underlying insurance contract claims are core. Some arguments for deeming the contract claims core are unavailing. While "[t]he debtors' rights under its insurance policies are property of a debtor's estate," *St. Clare's Hosp. & Health Ctr. v. Insurance Co. of N. Am. (In re St. Clare's Hosp. & Health Ctr.)*, 934 F.2d 15, 18 (2d Cir. 1991), the contract claims are not rendered core simply because they involve property of the estate. "The issue [in the contract claims] is the *scope* of the insurance policies, an issue of contractual interpretation, not their ownership." *In re United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997). A general rule that such proceedings are core because they involve property of the estate would "create[ ] an exception to *Marathon* that would swallow the rule." *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1102 (2d Cir. 1993).

The Trust argues that the proceedings are core because not all of the insurance claims have been fully developed pre-petition. However, the critical question in determining whether a contractual dispute is core by virtue of timing is not whether the *cause of action* accrued post-petition, but whether the *contract* was formed post-petition. The bankruptcy court has core jurisdiction over claims arising

from a contract formed post-petition under § 157(b)(2)(A). *See Ben Cooper, Inc. v. Insurance Co. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1399-1400 (2d Cir.), *vacated on other grounds*, 498 U.S. 964 (1990), *opinion reinstated*, 924 F.2d 36 (2d Cir. 1991). But a dispute arising from a pre-petition contract will usually not be rendered core simply because the cause of action could only arise post-petition. In *Orion*, for example, we held to be non-core Orion's cause of action for anticipatory breach of a pre-petition contract that sought declaratory and other relief from Showtime even though the event that triggered Orion's claim occurred post-petition. *See In re Orion Pictures Corp.*, 4 F.3d at 1097, 1102; *see also McMahon v. Providence Capitol Enters., Inc. (In re McMahon)*, 222 B.R. 205, 208 (S.D.N.Y. 1998).[1]

Notwithstanding that the Trust's claims are upon pre-petition contracts, we conclude that the impact these contracts have on other core bankruptcy functions nevertheless render the proceedings core. Indemnity insurance contracts, particularly where the debtor is faced with substantial liability claims within the coverage of the policy, "may well be . . . 'the most important asset of [i.e., the debtor's] estate,' " *Dicola v. American S.S. Owners Mut. Protection & Indem. Ass'n (In re Prudential Lines Inc.)*, 170 B.R. 222, 229 (S.D.N.Y. 1994) (quoting *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986) (alteration in original)). As such, resolving disputes relating to major insurance contracts are bound to have a significant impact on the administration of the estate. In *Orion*, we

1. This paragraph expresses the views of the author. Each of the other members of the panel has filed a concurring opinion setting forth his separate views.

concluded that where the insurance proceeds would only augment the assets of the estate for general distribution, the effect on the administration of the estate was insufficient to render the proceedings core. *See Orion*, 4 F.3d at 1102 ($77 million potential debt which admittedly would ease administration and liquidation of the estate still encompassed by *Marathon* prohibition). Resolving the disputes over the P&I policies here has a much more direct impact on the core administrative functions of the bankruptcy court.

The insurance proceeds are almost entirely earmarked for paying the personal injury claimants and represent the only potential source of cash available to that group of creditors. However, under the pay-first provisions of the P&I policies, those proceeds will not be made available until the Trust has paid the claims. Debtors' insolvency makes that threshold requirement difficult to meet; as is typical, their lack of assets leaves them unable to pay all of the claims first and seek indemnification later. *See Dicola v. American S.S. Owners Mut. Protection & Indem. Ass'n (In re Prudential Lines Inc.)*, 158 F.3d 65, 75 (2d Cir. 1998). Payment arrangements that may be possible when the insured is solvent, may not be available when the insured is insolvent. *See id.* at 73-76. Bankrupt debtors are limited in their ability to obtain new loans which otherwise could be used to create funds to satisfy the pay-first requirement, *see id.* at 75, and promissory notes issued by an insolvent insured to a claimant are not considered payment that triggers an obligation to indemnify, *see id.* at 74. The insolvent insured is therefore often forced to satisfy the pay-first requirement by means of complex, creative payment schemes. *See, e.g., Liman v. American S.S. Owners Mut. Protection & Indem. Ass'n*, 299

F. Supp. 106, 108 (S.D.N.Y.), *aff'd*, 417 F.2d 627 (2d Cir. 1969) (*per curiam*) (utilizing a payout/loan-back revolving cash procedure). In addition to the difficulties involved in paying the claims, the Trust faces a significant risk that the payment scheme ultimately employed will be deemed not to satisfy the pay-first requirement. *See In re Prudential Lines Inc.*, 158 F.3d at 73 (limiting the permissibility of *Liman* type arrangements).

If the Trust were initially to pay the claimants with assets earmarked for other creditors only to be informed afterwards that the payments did not trigger the Clubs' indemnification obligation, the result would be an inequitable distribution among the creditors. Therefore, in order to effectuate an equitable distribution of the bankruptcy estate, a comprehensive declaratory judgment is required to determine (1) whether a chosen payment plan will trigger the indemnification obligation and (2) the amounts payable under the insurance contracts. Thus, the declaratory proceedings brought by the Trust in this case directly affect the bankruptcy court's core administrative function of asset allocation among creditors, and for that reason they are core.

The district court ruled that it did not have pendent appellate jurisdiction to determine whether additional claims for punitive damages and attorneys' fees were core. The district court's decision not to exercise pendent appellate jurisdiction is not before us and we therefore do not reach the question whether the punitive damages claims and attorneys' fees, when properly considered, are core or non-core.

Appendix A

III. Annulment of the Arbitration Clauses

The parties have entered into valid agreements to arbitrate their contract disputes, some of which call for international arbitration. Arbitration is favored in our judicial system, *see Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220-21 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24 (1983), and the Arbitration Act mandates enforcement of valid arbitration agreements, *see Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The arbitration preference is particularly strong for international arbitration agreements. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require enforce[ment of] the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context."). The Clubs therefore argue that the bankruptcy court cannot enjoin arbitration of the proceedings. We disagree.

"Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *Shearson/Am. Express*, 482 U.S. at 226. That is true even where arbitration is sought subject to an international arbitration agreement. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "New York Convention"), "which requires the recognition of agreements to arbitrate that involve 'subject matter capable of settlement by

arbitration,' contemplates exceptions to arbitrability grounded in domestic law." *Mitsubishi*, 473 U.S. at 639 n.21. "[I]f Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from [the statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/Am. Express*, 482 U.S. at 227 (internal quotation marks and citations omitted); *see Oldroyd v. Elmira Sav. Bank FSB*, 134 F.3d 72, 75-79 (2d Cir. 1998) (applying analysis to FIRREA claims); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 848-52 (2d Cir. 1987) (applying the analysis to international arbitration of RICO claims). In the bankruptcy setting, congressional intent to permit a bankruptcy court to enjoin arbitration is sufficiently clear to override even international arbitration agreements.

The Bankruptcy Court has broad, well-established powers premised upon 28 U.S.C. §§ 1334 and 157 to preserve the integrity of the reorganization process. *See LTV Corp. v. Miller*, 109 B.R. 613, 621 (S.D.N.Y. 1990). Section 105 of the Bankruptcy Code states that where it has jurisdiction, the bankruptcy "court may issue *any* order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (emphasis added). The language of § 362, the automatic stay provision, is equally encompassing: "Except as provided in subsection (b) of this section, a petition [for bankruptcy protection] . . . operates as a stay, applicable to all entities, of -- the commencement or continuation . . . of a judicial, administrative or other action or proceeding against the debtor . . . ." 11 U.S.C. § 362(a)(1). "As the legislative

history of the automatic stay provision reveals, the scope of section 362(a)(1) is broad, staying all proceedings, including arbitration . . . ." *FAA v. Gull Air, Inc.*, 890 F.2d 1255, 1262 (1st Cir. 1989). Finally, one of the core purposes of bankruptcy "effectuated by Sections 362 and 105 of the Code" is to "allow the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *Shugrue v. Air Line Pilots Ass'n Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 989 (2d Cir. 1990). However, by not granting the bankruptcy court exclusive jurisdiction over non-core matters, "it is clear that in 1984 Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court." *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1157 (3d Cir. 1989); *see also MCI Telecomm. Corp. v. Gurga*, 176 B.R. 196, 200 (9th Cir. 1994).

Thus, there will be occasions where a dispute involving both the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, and the Arbitration Act, 9 U.S.C. § 1 *et seq.*, "presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution." *Societe Nationale Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp.*, 80 B.R. 606, 610 (D. Mass. 1987).

Such a conflict is lessened in non-core proceedings which are unlikely to present a conflict sufficient to override

by implication the presumption in favor of arbitration. *See Hays & Co.*, 885 F.2d at 1161. Core proceedings implicate more pressing bankruptcy concerns, but even a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration. "Certainly not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code." *Insurance Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1067 (5th Cir. 1997). However, there are circumstances in which a bankruptcy court may stay arbitration, and in this case the bankruptcy court was correct that it had discretion to do so.

In exercising its discretion over whether, in core proceedings, arbitration provisions ought to be denied effect, the bankruptcy court must still "carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause." *Hays & Co.*, 885 F.2d at 1161. The Arbitration Act as interpreted by the Supreme Court dictates that an arbitration clause should be enforced "unless [doing so] would seriously jeopardize the objectives of the Code." *Id.* That inquiry constitutes a mixed question of law and fact with legal conclusions being reviewed *de novo*, and factual determinations being reviewed for clear error. *See In re Ionosphere Clubs*, 922 F.2d at 988. Where the bankruptcy court has properly considered the conflicting policies in accordance with law, we acknowledge its exercise of discretion and show due deference to its determination that

arbitration will seriously jeopardize a particular core bankruptcy proceeding. We see no basis for disturbing the bankruptcy court's determination to that effect here.

In the instant case, the declaratory judgment proceedings are integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets. Furthermore, as we have previously pointed out, the bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor. *See Keene Corp. v. Fiorelli (In re E. & S. Dist. Asbestos Litig.)*, 14 F.3d 726, 732 (2d Cir. 1993). The need for a centralized proceeding is further augmented by the complex factual scenario, involving multiple claims, policies and insurers. The bankruptcy court was not clearly erroneous in finding that "arbitration of the disputes raised in the Complaint would prejudice the Trust's efforts to preserve the Trust as a means to compensate claimants." *U.S. Lines I*, 169 B.R. at 825. It was within the bankruptcy court's discretion to refuse to refer the declaratory judgment proceedings, which it properly found to be core, to arbitration.

CONCLUSION

The opinion and order of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion. Costs of the appeal are awarded to the Trust.

Appendix A

JON O. NEWMAN, *Circuit Judge*, concurring:

I concur in the result and in all aspects of Judge Walker's opinion except his individual statement[1] of the view that whether a lawsuit alleging a post-petition breach of a pre-petition contract is a core proceeding depends on the impact the contract has on core bankruptcy functions. In my view, the efficient functioning of the bankruptcy system will be better served by a bright-line rule that treats as core proceedings all suits alleging post-petition breaches of pre-petition contracts.

This Circuit's approach to the issue of whether post-petition breaches of pre-petition contracts are core has not been consistent. We have held, albeit without discussion, that a suit alleging a post-petition breach of a pre-petition contract is core, *see St. Clare's Hospital and Health Center v. Insurance Company of North America (In re Clare's Hospital and Health Center)*, 934 F.2d 15, 18 (2d Cir. 1991), and we have said that "the timing of a *dispute* may render it uniquely a bankruptcy case." *Ben Cooper, Inc. v. Insurance Co. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1400 (2d Cir. 1990) (emphasis added), *vacated and remanded*, 498 U.S. 964 (1990), *reinstated on remand*, 924 F.2d 36, 38 (2d Cir. 1991). On the other hand, we have also held that a post-petition breach of a pre-petition contract was non-core. *See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion*

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1. As Judge Walker notes in footnote 1, his view that a suit alleging a post-petition breach of a contract is not necessarily a core proceeding is his individual view. My differing view is explained in this opinion. Judge Calabresi in his concurring opinion declines to reach the issue.

Pictures Corp.), 4 F.3d 1095, 1102 (2d Cir. 1993).[2] Two members of this Court, in their prior district court roles, thought that post-petition breaches of pre-petition contracts were core, *see Caplan v. Liberty Mutual Insurance Co. (In re Century Brass Products, Inc.)*, No. 91-2251, 1992 WL 22191, at *3 (D. Conn. Jan. 7, 1992) (Cabranes, J.); *London*

2. Judge Walker, the author of *Orion*, asserts in a statement of his individual views that *Orion* involved a post-petition breach. Whether the panel in *Orion* so regarded the matter is subject to some uncertainty. The Orion Pictures Corp. ("Orion"), the debtor, had been notified pre-petition that the contracting party, Showtime Networks Inc. ("Showtime"), considered Orion to have breached a key-man agreement. *See Orion*, 4 F.3d at 1097. Showtime then notified Orion post-petition that Showtime would not license certain films because of Orion's pre-petition breach. *See id.* Orion claimed that Showtime's action was an anticipatory breach of the contract. Orion then brought a declaratory action to establish that its alleged pre-petition breach of the contract did not justify Showtime's alleged post-petition breach. The *Orion* opinion refers to the action as "a pre-petition contract action," *id.* at 1102, and, in citing *Beard v. Braunstein*, 914 F.2d 434 (3d Cir. 1990), as support for the ruling that the *Orion* action is non-core, quotes from *Beard* this sentence: " 'It is clear that to the extent that the claim is for *pre-petition contract damages*, it is non-core.' " *Orion*, 4 F.3d at 1102 (quoting *Beard*, 914 F.2d at 443) (emphasis added). Moreover, at least two courts and one commentator have viewed *Orion* as a pre-petition breach. *See In re Seatrain Lines, Inc.*, 198 B.R. at 51 (Sotomayor, J.); *United States Lines, Inc. v. American S.S. Owners Mutual Protection & Indemnity Ass'n (In re United States Lines, Inc.)*, 169 B.R. 804, 817-18 (Bankr. S.D.N.Y. 1994) ("*United States Lines I*"); Andrew M. Campbell, *Action for Breach of Contract as Core Proceedings in Bankruptcy under 28 U.S.C. § 157(b)*, 123 A.L.R. Fed. 103, § 10[a] (1995). Nevertheless, since Judge Walker was the author of *Orion*, I accept his characterization that *Orion* involved a post-petition breach.

Steamship Owners' Mutual Life Insurance Ass'n (In re Seatrain Lines, Inc.), 198 B.R. 45, 51-52 (S.D.N.Y. 1996) (Sotomayor, J.), and the leading commentator seems to agree, *see* 1 *Collier on Bankruptcy* ¶3.02[3][d][ii] (15th ed. 1999) ("causes of action owned by the debtor at the time the title 11 case is filed" are non-core, implying that causes of action arising thereafter, *e.g.*, for post-petition breach, are core).

On this inconclusive state of the law in the Second Circuit, I believe the issue of whether a suit for a post-petition breach of a pre-petition contract is core remains open, and the Court's opinion today, holding the suit by United States Lines to be core because of its impact on core functions leaves the ultimate issue for another day. I agree, as Judge Walker's opinion demonstrates, that this suit affects core functions and, for that reason, can be considered core, but I would deem it core simply because it involves a post-petition breach.

We emphasized the narrowness of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which, it is well to recall, involved a pre-petition breach of a contract, when we quoted with approval then Judge Breyer's observation that Congress intended the concept of "core proceedings" to be " 'interpreted broadly, close to or congruent with constitutional limits.' " *Resolution Trust Corp. v. Best Products Co. (In re Best Products Co.)*, 68 F.3d 26, 31 (2d Cir. 1995) (quoting *Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 168 (1st Cir. 1987)). There can be nothing unconstitutional in permitting a non-Article III bankruptcy court to adjudicate a cause of action for a post-petition breach of a pre-petition

contract, a cause of action that did not exist until the jurisdiction of the bankruptcy court attached.

The post-petition breach creates a cause of action that is an asset of the bankruptcy estate, distinct from the contractual rights arising from the pre-petition contract. In *Marathon*'s terms, the cause of action for a post-petition breach is not "antecedent to the reorganization petition." *Marathon*, 458 U.S. at 84. Although the cause of action for a post-petition breach may be regarded as merely seeking the benefit of what the contracting obligee expected to obtain from its pre-petition contract, the damages to be obtained from that action might be less than the exact equivalent of the value of the contractual rights. Surely, most entities, and especially those with financial difficulties precipitating bankruptcy, would not willingly trade the continuation of on-going contractual relationships for a cause of action for a post-petition breach of contract.

Since a cause of action for a post-petition breach *can* constitutionally be considered core, it always should be in order to promote the efficient functioning of the bankruptcy system. That efficiency will be substantially impeded by injecting into numerous bankruptcy proceedings the fact-specific and somewhat nebulous issue of whether a particular post-petition breach of a pre-petition contract has a sufficient impact on core functions to render the cause of action core. The five-year delay in this case, from 1994 when the Bankruptcy Court declared the contract action core, *see United States Lines I*, 169 B.R. at 821, through 1997 when the District Core declared the action non-core, *see United States Lines, Inc. v. American S.S. Owners Mutual Protection*

& Indemnity Ass'n (In re United States Lines, Inc.), 220 B.R. 5, 11 (S.D.N.Y. 1997), until now in 1999 when this Court declares the action core, well illustrates my point. A bright-line rule treating all suits for post-petition breaches as core will better serve the interests of all parties involved in bankruptcy proceedings.

I therefore concur in the result, and subject to the qualification expressed in this opinion, concur in Judge Walker's opinion.

Appendix A

GUIDO CALABRESI, *Circuit Judge*, concurring:

I too "concur in the result and in all aspects of Judge Walker's opinion except the portion indicating that whether a lawsuit alleging a post-petition breach of a pre-petition contract is a core proceeding depends on the impact the contract has on core bankruptcy functions." Judge Newman's Concurrence at 1. But my reasons for not joining fully in that part of Judge Walker's opinion are different from Judge Newman's.

Judge Walker's opinion suggests that *Orion Pictures Corp. v. Showtime Networks, Inc.* (*In re Orion Pictures Corp.*), 4 F.3d 1095 (2d Cir. 1993), settled the question of whether, in this circuit, every post-petition breach of a pre-petition contract is necessarily a core bankruptcy proceeding. In his view, *Orion*, by holding that a post-petition breach of a pre-petition contract was non-core, made clear that the issue of whether such a proceeding is or is not core must be determined on a case-by-case basis and depends on the impact that the contract has on core bankruptcy functions. Judge Newman, after arguing forcefully that, despite *Orion*, the law of this circuit is unsettled, gives strong reasons why he believes that a bright-line rule, holding all post-petition breaches of pre-petition contracts to be core, is both constitutional under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and preferable to Judge Walker's case-by-case approach.

Were I to reach the question, I would be inclined to favor a case-by-case approach. But since we do not need to resolve the issue to decide the case before us, I would defer the matter

to another day and to a case that raises the question squarely. Like Judges Walker and Newman, I have no doubt that this particular post-petition breach of a pre-petition contract is core. That is all I need to decide the instant case.

Accordingly, I express no view on whether, as Judge Walker suggests, the issue is settled by *Orion*, or, as Judge Newman contends, that it is not. Moreover — while leaning towards Judge Walker's position — I also take no stand on whether, if the issue is open, the better approach is (a) to have a bright line rule that all post-petition breaches of pre-petition contracts are core, (b) to require a situation-by-situation analysis, or (c) to take a middle ground between these options and, for example, impose a strong, but rebuttable, presumption that all post-petition breaches of pre-petition contracts are core.

I therefore concur in the result, and, with the qualifications stated above, I concur in Judge Walker's opinion.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 5, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Ad. Pro. No. 93-8004A
98-502
Docket Number

In re United States Lines, Inc.

NOTICE OF MOTION
state type of motion
for allowance of an interlocutory appeal
under 28 U.S.C. 1292(b).

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Morris Stern, Esq.
Stern, Dubrow & Marcus
111 Dunnell Road
Maplewood, New Jersey 07040
(973) 762-3393

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

See Attached List

Appendix B

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:
A. by scheduling order? ☐ Yes ☒ No
B. by firm date of argument notice? ☐ Yes ☒ No

* * *

Judge or agency whose order is being appealed:
Judge Sidney H. Stein, U.S. District Court, S.D.N.Y.

Brief statement of the relief requested:
Permission to appeal an interlocutory opinion and order of the District Court for the Southern District of New York.

* * *

By: *(Signature of attorney)*
s/ Morris Stern
Signed name must be printed beneath
Morris Stern, Esq.

Appendix B

Appearing for: *(Name of party)*
United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust

Appellant or Petitioner:
☒ Plaintiff

* * *

Date
March 12, 1998

ORDER

* * *

Before: FEINBERG, PARKER, and PHILLIPS, C.JJ

IT IS HEREBY ORDERED that the motion be and it hereby is *granted*. The Clerk's Office to issue a scheduling order.

5/5/98
Date

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND DECIDED NOVEMBER 26, 1997 AND FILED DECEMBER 4, 1997

In Re UNITED STATES LINES, INC. and UNITED STATES LINES (S.A.) INC. f/k/a MOORE McCORMACK LINES, INC.,

Debtors;

UNITED STATES LINES, INC. and UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST,

Plaintiffs-Appellees,

ASBESTOSIS CLAIMANTS,

Plaintiff-Intervenors-Appellees,

– against –

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., WEST OF ENGLAND OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., CONTINENTAL INSURANCE CORPORATION, THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON MUTUAL STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, MARINE OFFICERS OF AMERICA CORP., and THE TRAVELERS INSURANCE COMPANY,

Defendants-Appellants.

Appendix C

95 Civ. 3175 (SHS), 95 Civ. 3177 (SHS), 95 Civ. 3179 (SHS), 95 Civ. 3187 (SHS), 95 Civ. 3189 (SHS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

220 B.R. 5; 1997 U.S. Dist. LEXIS 19195; 1998 AMC 923

November 26, 1997, Decided
December 4, 1997, Filed

* * *

JUDGES: SIDNEY H. STEIN, U.S. District Judge.

OPINION BY: SIDNEY H. STEIN

OPINION: OPINION AND ORDER

This is an appeal from an order of the bankruptcy court, dated February 28, 1995, entered in accordance with an opinion issued on July 5, 1994, which, among other actions: (1) denied the motion of appellants West of England Owners Mutual Protection and Indemnity Association, Inc. ("West of England"), the United Kingdom Mutual Steamship Assurance Association ("the UK Club"), Limited Assuranceforeningen Skuld ("Skuld"), and Liverpool & London Mutual Steamship Protection and Indemnity Association Limited ("Liverpool and London") (collectively, "the Foreign Clubs"), to stay, pending arbitration, adversary proceedings brought by debtors, appellees United States Lines, Inc. and United States Lines (S.A.), Inc. Reorganization

Trust ("the Trust"); (2) denied appellants' motions for a determination that the adversary proceeding is a "non-core" proceeding pursuant to 28 U.S.C. § 157; (3) denied appellants' motion for summary judgment for lack of a justiciable case or controversy (4) sua sponte granted summary judgment to appellee on the question of when insurance coverage is triggered pursuant to the insurance policies at issue; and (5) denied appellants' motions for summary judgment on appellee's claims for punitive damages and attorneys' fees on its claim pursuant to N.Y. Gen. Bus. Law § 349.

In an order dated August 16, 1996, this Court decided that, in addition to exercising jurisdiction over the Foreign Clubs' appeals as of right of the bankruptcy court's order denying a stay of the proceedings pending arbitration, it would exercise pendent appellate jurisdiction over the bankruptcy court's determination that the adversary proceedings at issue were "core" proceedings since resolution of the "core/non-core" issue is "inextricably intertwined" with resolution of the arbitrability question. See In re United States Lines, Inc., 199 B.R. 465, 475 (S.D.N.Y. 1996). In that order, this Court also determined that "both efficiency and fairness dictate that the Court possesses pendent party appellate jurisdiction" over the appeal by all other defendants of the "core/non-core" issue, since the Court's determination of that issue will become the law of the case, binding on all parties to the action. Id. at 476 (citations omitted).

For the reasons that follow, the Court now concludes that the bankruptcy court erred in determining that the adversary proceedings before it were "core" proceedings. The Court

also concludes that in the context of this non-core adversary proceeding brought by the Trustee, the Bankruptcy Code does not conflict with the Federal Arbitration Act ("FAA") so as to permit the bankruptcy court discretion to deny enforcement of arbitration clauses at issue in this case. Accordingly, the Court will reverse the bankruptcy court with respect to these two determinations and remand for further proceedings consistent with this order.

BACKGROUND

Most of the facts pertinent to this appeal are set forth in the extensive opinion of the bankruptcy court, see In re United States Lines, Inc., 169 B.R. 804, 809-11 (Bankr. S.D.N.Y. 1994), and in this Court's August 16, 1996 order, see In re United States Lines, Inc., 199 B.R. at 468-69 (S.D.N.Y. 1996); familiarity with each is presumed.

Defendants are various foreign and domestic maritime insurers ("the Clubs") from whom United States Lines, Inc. and United States Lines (S.A.), Inc. (collectively, "Debtors"), had purchased Protection and Indemnity policies ("P & I policies") over the course of some forty years between 1946 and 1986.[1] See In re United States Lines, Inc., 169 B.R. at 809.

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1. Specifically, there are four domestic defendants and four foreign defendants. The domestic defendants are: American Steamship Owners Mutual Protection and Indemnity Association, Inc. ("American Club"), The Continental Insurance Company ("Continental Insurance"), The Travelers Insurance Company ("Travelers"), and a group of insurers, including The Aetna Casualty

(Cont'd)

Appendix C

On November 24, 1986, Debtors filed a voluntary petition for relief pursuant to Chapter 11 of the Bankruptcy Code. See 11 U.S.C. § 101 et seq.; 169 B.R. at 810. Debtor's plan ("the Plan") was confirmed on May 16, 1989. See 169 B.R. at 810. The Plan transfers Debtors' maritime insurance rights to appellee United States Lines, Inc. and United States Lines (S.A.), Inc. Reorganization Trust ("the Trust") and its Trustee. See id. The Plan also authorized the Trustee to resolve disputed personal injury claims, distribute Debtors' assets to claimants, and collect funds for reimbursement of those distributions pursuant to the Debtors' maritime insurance policies, including the P & I policies. See id.

Of all of the Clubs, only the American Club has filed a proof of claim against the Debtors. The American Club filed a proof of claim in July 1988 for unpaid premiums and assessments. See Brief of Plaintiff-Appellee United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust ("Plfs' Brief") at 67.

On December 8, 1992, the bankruptcy court entered a stipulation of conditional settlement between the Trust and a group of 106 claimants represented by the law firm of Dickstein, Shapiro, Moran and Oshinsky ("the DSM Claimants"). See 169 B.R. at 811. The following month, on

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(Cont'd)
and Surety Co., CIGNA, Great American Insurance Co., Hartford Fire Insurance Co., and United States Fire Insurance Co., who are successors-in-interest to the Fulton P&I Underwriting Syndicate ("Fulton Syndicate Survivors"). The Foreign Club defendants, identified above, include: UK Club, Liverpool & London, Skuld, and West of England.

Appendix C

January 5, 1993, the Trust initiated this adversary proceeding, seeking a declaration, pursuant to 28 U.S.C. § 2201, of its and the Clubs' respective rights and obligations pursuant to the various P & I policies. See id. Asbestos claimants represented by The Maritime Asbestosis Legal Clinic ("MALC") were permitted to intervene as plaintiffs in this proceeding pursuant to Fed. R. Civ. P. 24 and Fed. R. Bankr. P. 7024. They are also plaintiff-appellees and seek declaratory relief identical to that sought by the Trust. See id.

Defendants subsequently moved for summary judgment and, as noted, on July 5, 1994, the bankruptcy court issued an opinion denying the motion and sua sponte granting summary judgment to the Trust and the MALC claimants on one issue relating to when coverage was triggered pursuant to applicable P & I policies. See 169 Bankr. at 831-32. Relevant to this appeal were the bankruptcy court's holdings that the matter before it was a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O), because it is a "matter concerning the administration of the estate" and affects "the adjustment of the debtor-creditor relationship," id. at 821, and its finding that, because the proceeding was a core proceeding, it had discretion to deny the Foreign Clubs' motions to compel arbitration. See id. at 824-25.

Subsequent to the bankruptcy court's decision, in February of 1995, the parties settled their differences with respect to the DSM Claimants. Accordingly, those claims are no longer a subject of the adversary proceeding. However, the Trustee and MALC still seek a declaration with respect to additional amounts the Trust may have to pay in future settlements of

potentially thousands of other MALC-represented claimants. See Plf's Brief at 10.

As noted above, in this Court's August 16, 1996 opinion, the Court determined that it would exercise appellate jurisdiction over two issues that were part of the bankruptcy court's disposition of defendants' summary judgment motions. The two issues are as follows: (1) whether this action by the Trustee seeking a declaration of the respective rights and obligations of all parties pursuant to maritime P & I insurance contracts entered into pre-petition is a "core" or "non-core" proceeding pursuant to 28 U.S.C. § 157 of the Bankruptcy Code; and (2) whether the bankruptcy court correctly found it had discretion to deny the Foreign Clubs' request for a stay in order to enforce arbitration provisions in their insurance contracts.

DISCUSSION

I. Core or Non-Core Proceeding

Defendants contend that the bankruptcy court erred in concluding that the Trust's declaratory judgment action constituted a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O), and assert that, at most, the proceeding is a non-core, "related to" proceeding pursuant to 28 U.S.C. § 157(c)(1). A bankruptcy court's conclusion that a proceeding is core pursuant to 28 U.S.C. § 157(b) is a question of law which this Court reviews *de novo*. See In re Burger Boys, Inc., 183 B.R. 682, 685 (S.D.N.Y. 1994); Brunner v. New York Higher Educ. Servs., 831 F.2d 395, 396 (2d Cir. 1987).

In opposing the bankruptcy court's finding on this issue, defendants rely principally on the line of cases beginning with Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982), the seminal Supreme Court case outlining the limits of bankruptcy court jurisdiction. In Marathon, the Court found unconstitutional a congressional grant of jurisdiction to bankruptcy courts, via a provision of the Bankruptcy Act of 1978, which ostensibly provided jurisdiction "over all 'civil proceedings arising under . . . or arising in or *related to* cases under title 11.' " Id. at 54, 102 S. Ct. at 2862 (emphasis in original) (quoting 28 U.S.C. § 1481 (Supp. IV 1980)). In that case, the underlying cause of action was a state breach-of-contract claim, which arose before Northern Pipeline (the debtor) petitioned the bankruptcy court for Chapter 11 reorganization. The bankruptcy court exercised jurisdiction over the claim because the debtor did not initiate the action until after it filed a Chapter 11 petition, and because the terms of the 1978 Act allowed the exercise of jurisdiction over such *related* claims. However, the Supreme Court ruled that Congress had overstepped its bounds and could not constitutionally empower a non-Article III bankruptcy court to adjudicate and issue final orders in a state breach-of-contract action, based upon a pre-petition contract, brought by a debtor against a defendant who was not a party to the bankruptcy case. See id. at 71, 102 S. Ct. at 2871-72; see also Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584, 105 S. Ct. 3325, 3334, 87 L. Ed. 2d 409 (1985).

Congress enacted 28 U.S.C. § 157 largely as a response to Marathon. See In re Orion Pictures Corp., 4 F.3d 1095, 1100

(2d Cir. 1993); In re Ben Cooper, Inc., 896 F.2d 1394, 1398 (2d Cir.) (Ben Cooper I), vacated and remanded, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 408 (1990), reinstated on remand, In re Ben Cooper, Inc., 924 F.2d 36, 38 (2d Cir.) (Ben Cooper II), cert. denied, 500 U.S. 928, 111 S. Ct. 2041, 114 L. Ed. 2d 126 (1991). Section 157 classifies matters as either core or non-core proceedings. See § 157(b)(1), (c)(1). When adjudicating matters deemed core pursuant to section 157(b)(2), a bankruptcy court may issue final orders and judgments. § 157(b)(1). When adjudicating non-core but related matters, the bankruptcy court may not issue final orders and judgments without the consent of the parties; instead, the court must issue proposed findings of fact and conclusions of law to the district court for *de novo* review. § 157(c)(1). Moreover, the bankruptcy court may not hold a jury trial in a non-core proceeding. See Orion, 4 F.3d at 1101.

Although the statute does not define "core," section 157(b)(2) catalogues a non-exclusive list of matters considered to be core. Included in the list are two catchall provisions, each of which was relied upon by the bankruptcy court below. Specifically, the bankruptcy court found that the proceeding involves "matters concerning the administration of the estate," § 157(b)(2)(A), and is a "proceeding affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship." § 157(b)(2)(O). The bankruptcy court relied heavily on its finding that the P & I policies at issue are and will continue to be "property of the estate despite confirmation of the Debtors' plan of reorganization and the transfer of the policies to a disbursement trust." 169 B.R. at 820. The bankruptcy court also stressed that it was potentially dealing

with the resolution of thousands of asbestos-related tort claims, and that a finding that the proceeding was core was necessary to ensure the "existence and maintenance of a claims allowance process to compensate individuals whose injuries manifest anywhere from ten to forty years following initial exposure." Id.

The bankruptcy court recognized that the two provisions upon which it relied, § 157(b)(2)(A) and § 157(b)(2)(O), while potentially extremely broad in scope, must be interpreted in light of Marathon's jurisdictional limitations. See 169 B.R. at 817. However, the bankruptcy court's and now appellees' effort to distinguish Marathon and its progeny is unavailing.

Appellees attempt to distinguish Marathon on its facts, noting that while both this case and Marathon involved contracts entered into pre-petition, this case -- unlike Marathon -- involves a cause of action that only arose post-petition. See Continental Casualty Co. v. Stronghold Ins. Co., Ltd., 77 F.3d 16 (2d Cir. 1996) (cause of action for insurance coverage arises pursuant to New York law when the insured demands coverage and is refused); In re Seatrain Lines, Inc., 198 B.R. 45, 51 (S.D.N.Y. 1996). As such, it is a "hybrid" claim which some district courts in this Circuit have found to be distinguishable from Marathon, and properly adjudicable by bankruptcy courts as core proceedings. See In re Seatrain Lines, Inc., 198 B.R. at 51; In re Century Brass Products, Inc., 1992 U.S. Dist. LEXIS 1277, 1992 WL 22191, at 2-3 (D. Conn. 1992). Appellees cite, in addition to the aforementioned district court cases, the Second Circuit cases of Ben Cooper I and St. Clare's Hosp. & Health Ctr. v.

Insurance Co. of N. Am., 934 F.2d 15 (2d Cir. 1991), for the proposition that the post-petition timing of the alleged cause of action distinguishes this case from Marathon. See Plfs' Brief at 43; Ben Cooper I, 896 F.2d at 1400; see also In re Prudential Lines, Inc., 170 B.R. 222, 229 (S.D.N.Y. 1994) (relying on St. Clare's Hospital).

However, importantly, Ben Cooper I involved an insurance policy obtained by the debtor post-petition, and was thus plainly distinguishable from Marathon and from the case at bar. See Ben Cooper I, 896 F.2d at 1399. The Ben Cooper I court made clear that, since the policies were entered into post-petition, the insurance companies which entered into the contracts "were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate." Id. Thus, the concern expressed by the Supreme Court in Marathon that a nonparty would be involuntarily subjected to having the debtor's state law claim against it decided by an Article I judge was not present. See In re S.G. Phillips Constructors, Inc., 45 F.3d 702, 706 (2d Cir. 1995); In re Manville Forest Prods. Corp., 896 F.2d 1384, 1389 (2d Cir. 1990). Here, in stark contrast, each of the Clubs entered into insurance contracts with the Debtors well before Debtors filed for bankruptcy and could not have been aware that they were subjecting themselves to having possible disputes concerning such policies adjudicated by a non-Article III court. For these reasons alone, reliance on Ben Cooper I is unavailing.

The facts of St. Clare's Hospital are more on point. There, the bankruptcy court, with little analysis, found that a debtor's post-petition suit to enforce debtor's rights under a pre-petition, medical malpractice insurance policy was a core

proceeding pursuant to 28 U.S.C. § 157(b)(2). St. Clare's Hospital, 934 F.2d at 18. The district court reversed the bankruptcy court, but only on the grounds that the bankruptcy court had erred in rejecting the insurer's affirmative defense of "late notice" of the hospital's claim. See St. Clare's Hosp. & Health Ctr. v. Insurance Co. of N. Am., 1990 U.S. Dist. LEXIS 16781, *12. The district court did not address the insurer's argument that the proceeding was non-core. Id. at *7-8. Then, again without comment or analysis, the Second Circuit reversed the district court and affirmed the bankruptcy court "for substantially the reasons set forth in the decision of the bankruptcy court." St. Clare's Hospital, 934 F.2d at 16. In short, St. Clare's Hospital did not directly address the question of whether a post-petition claim arising out of a pre-petition insurance contract could -- consistent with the Supreme Court's decision in Marathon -- constitute a core proceeding pursuant to 28 U.S.C. § 157.

More importantly, in its most recent decision on point, the Orion case, the Second Circuit squarely held that a "breach-of-contract action by a debtor against a party to a prepetition contract, who has filed no claim with the bankruptcy court, is non-core." Orion, 4 F.3d at 1102. The Orion Court also made clear that section 157(b)(2)(A) -- one of the catchall provisions upon which the bankruptcy court below relied -- cannot be read so broadly that it creates an exception to Marathon that swallows its rule, since all actions by debtors to collect on pre-petition contracts "would be expected to inure to the benefit of the debtor estate and thus 'concern[ ]' its 'administration.' Id. (quoting 28 U.S.C. § 157(b)(2)(A)). Such reasoning also clearly applies to the other catchall relied upon by the bankruptcy court, § 157(b)(2)(O), since any

action to collect on a pre-petition contract, such as an insurance policy, would "affect[ ] the liquidation of the assets of the estate." § 157(b)(2)(O). Most importantly, despite the bankruptcy court's claim to the contrary, Orion -- like the instant case -- involved an alleged post-petition breach of a pre-petition contract.[2]

Thus, with respect to all of the defendants who did not file a proof of claim against the debtor (all of the Clubs except the

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2. The bankruptcy court attempted to distinguish Orion on the grounds that the case involved "alleged prepetition breach of contract, rather than a postpetition breach." 169 B.R. at 817. This distinction was also cited by the district court in In re Seatrain. See 198 B.R. at 51 n.8 ("In Orion, the debtor sued for anticipatory breach of contract which occurred two months before the petition was filed."). However, a brief examination of the chronology in Orion makes clear that, as here, the cause of action did not accrue until after the petition for bankruptcy was filed. Orion concerned an agreement under which Showtime was to license Orion's films on the condition that, among other things, Orion continue to employ certain executives (the "key man" clause). Orion, 4 F.3d at 1097. After management changes at Orion, Showtime sent letters to Orion in October and November 1991, notifying Orion that it was in violation of the "key man" clause. Subsequently, on December 11, 1991, Orion filed for Chapter 11 reorganization. Id. On December 24, 1991 -- post-petition -- Showtime notified Orion that it would cease licensing Orion's films pursuant to the agreement. Finally, in March 1992, Orion filed the adversary proceeding against Showtime, claiming anticipatory breach of their pre-petition contract and seeking declaratory and other relief. Id. Given the timing of the events in Orion, it is clear that the alleged cause of action for anticipatory breach did not arise until Showtime declared that it was no longer going to license Orion's films pursuant to the agreement; an event that did not occur until post-petition.

American Club) both the holding of Orion and its reasoning mandate a finding that the adversary proceeding brought by the Trustee is non-core. Moreover, with respect to the American Club, despite the Trust's claims to the contrary, see Plfs' Brief at 67, the Trustee's adversary proceeding simply does not arise out of the same transaction as the American Club's proof of claim against the estate for unpaid premiums, and it therefore "cannot be construed as a counterclaim to [the American Club's] proof of claim." In re Seatrain, 198 B.R. at 50 n.7 (citing Katchen v. Landy, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966)). Therefore, the American Club's proof of claim against the estate does not serve as an alternative basis for a finding that the adversary proceedings against the American Club are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(C) ("counterclaims by the estate against persons filing claims against the estate" are core matters).

Accordingly, this Court finds that both Marathon and Orion dictate that the adversary proceedings at issue in this case be deemed non-core proceedings. The bankruptcy court's finding that the P & I policies at issue continue to exist as property of the estate which may be earmarked by the Trustee for distribution to a potentially large class of claimants, does not lead this Court to modify its conclusion that the adversary proceedings are, at bottom, state law contract claims, arising from pre-petition contracts, which, under both Marathon and Orion cannot be finally adjudicated by a non-Article III court.

Appendix C

II. Arbitration

The parties disagree about the standard a bankruptcy court should apply when deciding whether or not to enforce arbitration provisions in the context of an adversary proceeding brought by a debtor. The Foreign Clubs contend that the bankruptcy court erred when it concluded that it had discretion to refuse to stay the proceedings in favor of arbitration pursuant to the arbitration provisions in each of the Foreign Club's P & I policies.[3] The Trustee counters that the bankruptcy court did, in fact, have discretion to deny enforcement of the arbitration clauses, regardless of whether the proceeding was core or non-core, and -- citing a series of district court cases -- contends that in the Second Circuit, at least in the context of bankruptcy proceedings, arbitration is disfavored. See Plfs' Brief at 70-72. What standard the bankruptcy court should have employed is a question of law that this Court reviews *de novo*.

Section 2 of the Federal Arbitration Act specifically provides that "a written provision in any Maritime . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 3 further provides that a court "upon being satisfied that the issue involved . . . is referable to arbitration under such an agreement, *shall* on application of one of the parties, stay

3. The relevant provisions are quite similar, and all require that disputes be submitted to arbitration governed by English law. See 169 B.R. at 822-23, n.22.

the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Thus, on its face, Section 3 of the FAA mandates that a bankruptcy court stay adversary proceedings when one party has identified an enforceable arbitration provision relevant to the dispute.[4]

The Supreme Court, in addressing the arbitrability of federal RICO and securities fraud claims brought pursuant to the Securities and Exchange Act of 1934 in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226-27, 107 S. Ct. 2332, 2337-38, 96 L. Ed. 2d 185 (1987), confirmed the presumption that arbitration provisions are to be enforced pursuant to the FAA, stating:

> The Arbitration Act, standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim,

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4. The Foreign Clubs also point out that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201-208, requires enforcement of arbitration clauses in international contracts unless the clause is null and void. Thus, the Foreign Clubs urge, a requirement for English arbitration is enforceable. See AASMA v. American S.S. Owners Mut. Prot. & Indem., 95 F.3d 400, 405 (6th Cir. 1996).

> such an intent 'will be deducible from [the statute's] text or legislative history' or from an inherent conflict between arbitration and the statute's underlying purposes."

(citation omitted). The standard articulated in McMahon was reiterated by the Supreme Court two years later, in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483, 109 S. Ct. 1917, 1921, 104 L. Ed. 2d 526 (1989), a case addressing the arbitrability of securities fraud claims brought pursuant to the Securities Act of 1933.

The Debtors, however, argue that there is a "longstanding conflict between federal bankruptcy law and federal arbitration policy," Plfs' Brief at 70 (citing In re Chas P. Young Co., 111 B.R. 410, 416-17 (Bankr. S.D.N.Y. 1990)), and cite pre-McMahon and pre-Rodriguez Second Circuit case law for the proposition that bankruptcy court judges have discretion to deny arbitration. Id. at 71 (citing Allegaert v. Perot, 548 F.2d 432 (2d Cir.), cert. denied, 432 U.S. 910, 97 S. Ct. 2959, 53 L. Ed. 2d 1084 (1977)).

However, this Court finds that, especially in light of the McMahon-line of cases, Allegaert can no longer bear the precedential weight accorded by Debtors. First, the Second Circuit has recently made clear its view that the FAA "establishes a liberal policy in favor of arbitration as a means to reduce 'the costliness and delays of litigation,' " Campaniello Imports, LTD. v. Saporiti Italia, 117 F.3d 655, 665 (1997) (citations omitted); a policy that is even stronger in the context of international transactions, such as the P & I policies entered into by the parties in this case. Id. (citing

Deloitte Noraudit v. Deloitte Haskins & Sells, 9 F.3d 1060, 1063 (2d Cir. 1993); Int'l Minerals and Resources, S.A. v. Pappas, et al., 96 F.3d 586, 592 (2d Cir. 1996)).

Second, recent courts addressing the enforceability of arbitration clauses in the bankruptcy context have applied the McMahon/Rodriguez framework, asking whether the party seeking to avoid enforcement of otherwise applicable arbitration provisions has demonstrated that arbitration would conflict with the purposes of the Bankruptcy Code, given the nature of the proceeding. See National Gypsum Co., et al. v. NGC Settlement Trust, etc., 118 F.3d 1056, 1065 (5th Cir. 1997); Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1155-62 (3d Cir. 1989). While courts have disagreed about how and whether to apply that standard in the context of core proceedings,[5] there is a strong consensus that, in the context of non-core matters, bankruptcy courts are without discretion to deny enforcement of applicable arbitration clauses absent some showing that the text, purpose, or history of the Bankruptcy Code precludes enforcement of arbitration. See Hays, 1156-57; National Gypsum, 118 F.3d at 1066. The bankruptcy court below also agreed with this assessment of the case law. See 169 B.R. at 823-24.

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5. Compare In re Spectrum Info. Techs., Inc., 183 B.R. 360, 363 (Bankr. E.D.N.Y. 1995); In re Sacred Heart Hosp., 181 B.R. 195, 202 (Bankr. E.D. Pa. 1995), with National Gypsum, 118 F.3d at 1067-69; In re Statewide Realty Co., 159 B.R. 719, 722 (Bankr. D.N.J. 1993); see generally, Mette H. Kurth, Comment, An Unstoppable Mandate and an Inmovable Policy: The Arbitration Act and the Bankruptcy Code Collide, 43 U.C.L.A. 999, 1022 (1996) (collecting cases).

The Trust now contends that the prospect of piecemeal litigation, resulting from granting a stay pending arbitration, would nullify the fundamental policy expressed throughout the Bankruptcy Code in favor of efficient dispute resolution, and point to a number of specific Code provisions that, according to the Trust, demonstrate that the Code often overrides non-bankruptcy law. See e.g., Plfs' Brief at 31-32. However, having considered all of the Trust's contentions, this Court finds that none of the Bankruptcy Code provisions cited by the Trust evidence congressional intent to preclude enforcement of arbitration in the context of a non-core proceeding brought by the Debtor to enforce pre-petition insurance policies. See In re Gurga, 176 B.R. 196, 197, 199 (9th Cir. BAP 1994); In re Dollar Corporation, 139 B.R. 192, 194 (Bankr. E.D. Mich. 1992). Thus, the Trust has not met its burden of establishing a conflict between the Bankruptcy Code and the FAA that would warrant nonenforcement of the applicable arbitration provisions in this proceeding, and this Court finds that the bankruptcy court erred in denying the Foreign Clubs' motion to stay the adversary proceeding pending arbitration.

CONCLUSION

Accordingly, this Court finds that the bankruptcy court erred in its determination that the adversary proceeding is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O) and in its holding that it had discretion to deny the Foreign Clubs' motions to stay the proceedings pending arbitration. The bankruptcy court's rulings on these two issues are reversed, and the matter is remanded to the bankruptcy court for further proceedings consistent with this opinion.

Appendix C

Date: New York, New York

November 26, 1997

SO ORDERED:

Sidney H. Stein

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND DECIDED AUGUST 16, 1996 AND FILED AUGUST 19, 1996

IN RE UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. f/k/a MOORE MCCORMACK LINES, INC.,

Debtors.

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST,

Plaintiffs-Appellees,

ASBESTOSIS CLAIMANTS,

Plaintiffs-Intervenors-Appellees,

– against –

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., WEST OF ENGLAND OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., CONTINENTAL INSURANCE CORPORATION, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON MUTUAL STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, MARINE OFFICERS OF AMERICA CORP., and THE TRAVELERS INSURANCE COMPANY,

Defendants-Appellants.

Appendix D

95 Civ. 3175 (SHS), 95 Civ. 3177 (SHS), 95 Civ. 3179 (SHS), 95 Civ. 3187 (SHS), 95 Civ. 3189 (SHS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

August 16, 1996, Decided
August 19, 1996, FILED

* * *

JUDGES: SIDNEY H. STEIN, U.S.D.J.

OPINION BY: SIDNEY H. STEIN

OPINION: OPINION AND ORDER

SIDNEY H. STEIN, District Judge.

This is an appeal from an order of the bankruptcy court, dated February 28, 1995, entered in accordance with a decision issued by that court on July 5, 1994, which, inter alia: denied appellants' motions for summary judgment for lack of a justiciable case or controversy; denied appellants' motions for summary judgment on the ground that this action is a "non-core" proceeding; sua sponte granted summary judgment to appellee on the question of when insurance coverage is triggered pursuant to the insurance policies in question; denied four of the appellants' motions to stay the action pending arbitration; denied appellants' motions to dismiss the complaint of the intervenors; and denied appellants' motions for summary judgment on appellee's

claims for punitive damages and attorneys fees and on its claim pursuant to N.Y. Gen. Bus. Law § 349.

Appellees have moved to dismiss the appeal in part on the ground that only the bankruptcy court's decision on arbitrability is appealable as of right. For the reasons that follow, the motion is granted in part and denied in part.

BACKGROUND

Most of the facts pertinent to this motion are set forth fully in the extensive opinion of the bankruptcy court, see In re United States Lines, Inc., 169 B.R. 804, 809-11 (Bankr. S.D.N.Y. 1994), familiarity with which is presumed.

United States Lines, Inc. and United States Lines (S.A.), Inc. (collectively, "Debtors"), among the world's largest shipping companies, are engaged in the international transportation of freight on ocean-going vessels. (See 169 B.R. at 809.) In excess of 8,000 of its former employees filed some 15,000 claims, pursuant to the Jones Act, 46 U.S.C. § 688 et seq., and the General Maritime Law, alleging injury suffered from exposure to asbestos while employed on Debtors' ships. (See 169 B.R. at 809.)

At various times during their existence, Debtors purchased insurance contracts, known as Protection and Indemnity policies ("P & I policies") from appellants, who are foreign and domestic maritime insurers ("the P & I Clubs" or "the Clubs"). (See 169 B.R. at 809.) The policies protect the insured against, inter alia, liability for bodily injury or death

for which the insured is liable by reason of the fact that it owns or operates the insured vessel. (See 169 Bankr. at 809.) Generally, a particular Club would insure Debtors' entire fleet for a particular year, with policy limits varying from year to year, and deductibles ranging from $250 to $100,000 for each accident or occurrence. (See 169 Bankr. at 810.)

On November 24, 1986, Debtors filed a voluntary petition for relief pursuant to Chapter 11 of the Bankruptcy Code, see 11 U.S.C. § 101 et seq. (See 169 Bankr. at 810.) Debtors' plan was confirmed on May 16, 1989. (See 169 Bankr. at 810.)

The plan transfers Debtors' maritime insurance rights to appellee United States Lines, Inc. and United States Lines (S.A.), Inc. Reorganization Trust ("the Trust") and its Trustee. (See 169 Bankr. at 810.) The Trustee is authorized to resolve disputed personal injury claims, distribute the Debtors' assets to claimants, and collect funds for reimbursements of those distributions pursuant to the Debtors' maritime insurance policies, including the P & I policies. (See 169 Bankr. at 810.)

On December 8, 1992, the bankruptcy court entered a stipulation of conditional settlement between the Trust and a group of 106 claimants represented by the law firm of Dickstein, Shapiro & Morin ("the DSM Claimants"). (See 169 Bankr. at 811.) The following month, the Trust filed this proceeding seeking a declaration, pursuant to 28 U.S.C. § 2201, of its and the Clubs' respective rights and obligations pursuant to the P & I policies. (See 169 Bankr. at 811; Appellants' Joint Record on Appeal ("R.") Vol. I, No. 1.)

Appendix D

On April 12, 1993, the bankruptcy court granted the Asbestosis Claimants' motion to intervene pursuant to Fed. R. Civ. P. 24 and Fed. R. Bankr. P. 7024. (See 169 Bankr. at 811.) The Asbestosis Claimants seek similar declaratory relief. (See 169 Bankr. at 811; R. Vol. I., No. 19.)

Subsequently, the Clubs moved for summary judgment and to dismiss the intervention complaint. As noted, on July 5, 1994, the bankruptcy court issued an opinion denying the motion in all but one respect not relevant here and sua sponte granted summary judgment to the Trust and the Asbestosis Claimants on one issue. (See 169 Bankr. at 831-32.)

At a status conference held on February 28, 1995, the parties presented to the bankruptcy court a final stipulation of settlement between the Trust and the Clubs with regard to the claims of the 106 DSM claimants. (R. Vol. VIII, Nos. 82, 84.) The court entered this stipulation as an order two days later. (R. Vol. VIII, No. 82.)

Also on February 28, 1995, the Clubs requested leave of the bankruptcy court to file a motion to reconsider that portion of the July 5, 1994 decision holding that a justiciable case or controversy was before the court, on the ground that the settlement of the 106 DSM claims had mooted the entire action. (R. Vol. VIII, No. 84, at 10-11.) The bankruptcy court orally denied the application, stating: "You can make [that argument] before the District Judge if you feel [the case is] moot and it should be vacated, but let a District Judge decide that." (R. Vol. VIII., No. 84, at 13.) The same day, the bankruptcy court issued an order in accordance with the July

5, 1994 decision, and that order was entered three days later. (R. Vol. VIII, No. 81.) The Clubs timely appealed the order.[1]

DISCUSSION

All parties agree that, by virtue of 9 U.S.C. § 16(a)(1)(A) and 28 U.S.C. § 158(a), only the bankruptcy court's order denying a stay of the proceedings pending arbitration to West of England, UK Club, Liverpool & London, and Skuld (collectively "the Foreign Clubs") is appealable as of right by those parties. The issues for determination are (1) whether

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1. Appellants West of England Ship Owners Mutual Insurance Association (Luxembourg) Ltd. ("West of England"), United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd. ("UK Club"), Liverpool and London Steamship Protection and Indemnity Association Ltd. ("Liverpool & London"), Assuranceforeningen Skuld ("Skuld"), and American Steamship Owners Mutual Protection and Indemnity Association, Inc. ("American Club") filed notices of appeal pursuant to Fed. R. Bankr. P. 8001(a).

Aetna Casualty and Surety Co., CIGNA Property and Casualty Insurance Co., Great American Insurance Co., Hartford Fire Insurance Co., United States Fire Insurance Co. (collectively "the Fulton Syndicate Survivors"), Continental Insurance Co. ("Continental"), and the Travelers Indemnity Co. ("Travelers") filed motions for leave to appeal pursuant to Fed. R. Bankr. P. 8001(b) and 8003.

To whatever extent notices of appeal were improperly filed, the Court considers them to be motions for leave to appeal, pursuant to Fed. R. Bankr. P. 8003(c). See In re Ionosphere Clubs, Inc., 179 Bankr. 24, 28 (S.D.N.Y. 1995); In re Pan Am Corp., 159 Bankr. 396, 401 (S.D.N.Y. 1993).

the Foreign Clubs may appeal more than just that portion of the bankruptcy court's order; and (2) if so, whether the American Club, the Fulton Syndicate Survivors, Continental, and Travelers (collectively "the Domestic Clubs") may join in the appeal of those other portions of that order, given that they do not have an appeal as of right as to any portion of the order. The Clubs make a number of contentions that the Court will address in turn.

A. Mootness and Ripeness

The UK Club, Liverpool & London, and the American Club, going beyond what the Court has understood to be the scope of these motions, urge that the opinion below be vacated and the case be dismissed as moot in light of the final settlement with regard to the 106 DSM claims. They contend that the bankruptcy court rested its opinion with regard to the justiciability of this action on the fact that the 106 DSM claims had not been fully settled. Now that those claims have been settled, they contend, the claims of the Asbestosis Claimants are not yet "of sufficient immediacy and reality" to form the basis of a live case or controversy. Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941). The argument, therefore, is more accurately stated as one of both mootness and lack of ripeness: the action is moot with regard to the 106 DSM claimants, and not ripe with regard to the Asbestosis Claimants.

These appellants correctly note that

> the established practice of [an appellate court] in dealing with a civil case from a court in the federal

> system which has become moot while on its way [to the reviewing court] or pending [that court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

United States v. Munsingwear, Inc., 340 U.S. 36, 39, 71 S. Ct. 104, 106, 95 L. Ed. 36 (1950).

The statement from Munsingwear, however, is not applicable in this case. The event that appellants assert mooted this matter, the DSM settlement, occurred not while the case was "on its way here," but while it was still in the bankruptcy court. The issue was presented to the bankruptcy court on February 28, 1995 in the form of an oral application to make a motion to reconsider, and the court orally denied the application the same day, implicitly holding that the DSM settlement did not affect the justiciability of the matter. The court then entered as an order of the court the stipulation of settlement on March 2, 1995, and entered an order embodying the July 5, 1994 decision the following day.[2]

Given the procedural posture of the case, then, the Clubs' attempt to have this Court consider the mootness/ripeness

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2. Thus, Skuld's assertion that "since the entry of the order of February 28, 1995 [embodying the July 5, 1994 decision], certain significant developments [the DSM settlements] have occurred" (Skuld's Mem. of Law at 5) (emphasis added), and Liverpool & London's assertion that "the DS&M cases have been settled, paid and removed as a basis for jurisdiction to hear the Adversary Complaint since [the bankruptcy court's] Order was entered" (Liverpool & London's Mem. of Law at 12) (emphasis added), are, at best, misleading.

issue is simply an attempt to raise that issue on an interlocutory basis. The bankruptcy court's holding that the case presents a live controversy, underlying its denial of the motion to dismiss for lack of subject matter jurisdiction, was made in the July 5, 1994 decision, reaffirmed at the February 28, 1995 status conference in light of the DSM settlements, and entered as an order on March 3, 1995. This portion of the order, therefore, is like any other denial of a motion to dismiss for mootness or lack of ripeness, or, indeed, for lack of subject matter jurisdiction generally: an unreviewable, interlocutory order. See 28 U.S.C. § 158(a); In re Cedar Tide Corp., 859 F.2d 1127, 1131-32 n.4 (2d Cir. 1988), cert. denied, 490 U.S. 1035, 109 S. Ct. 1933, 104 L. Ed. 2d 405 (1989); In re United States Catholic Conference, 824 F.2d 156, 164 (2d Cir. 1987), rev'd on other grounds sub nom., United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 108 S. Ct. 2268, 101 L. Ed. 2d 69 (1988); see also Triad Assocs., Inc. v. Robinson, 10 F.3d 492, 496 n.2 (7th Cir. 1993) (denial of motion to dismiss for lack of standing not final judgment); Crymes v. DeKalb County, 923 F.2d 1482, 1484 (11th Cir. 1991) (per curiam) (denial of motion to dismiss on ripeness grounds not immediately appealable). If this Court may review the bankruptcy court's determination of justiciability, the justification for such review must lie elsewhere.

B. Appealability of an Order Pursuant to 28 U.S.C. § 2201

The U.K. Club contends that the portion of the bankruptcy court's order holding that a live case or controversy exists pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, as well as that portion granting summary judgment to the

Trust and the asbestosis Claimants sua sponte pursuant to that Act, are immediately appealable pursuant to 28 U.S.C. § 2201(a). That subsection provides, in relevant part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(emphasis added). The U.K. Club contends that the second sentence of § 2201(a) by itself renders final both the bankruptcy court's declaration of what event triggers policy coverage and its determination that it had the authority to make that declaration.

This contention was thoroughly addressed and rejected by the Seventh Circuit in Peterson v. Lindner, 765 F.2d 698, 702-04 (7th Cir. 1985). The court there wrote that, while "declaratory judgments are intended to be as 'final' as any other judgments," there was no support for the "proposition that section 2201 was intended to make declaratory judgments somehow more final, or final at an earlier stage, than other sorts of judgments." Id. at 703. Rather, the second sentence of § 2201 embodies "the unremarkable proposition that when a declaratory judgment otherwise meets the requirements for finality, it will be considered final even though the relief granted is 'merely' declaratory rather than

coercive." Id.; see also Curlott v. Campbell, 598 F.2d 1175, 1180 (9th Cir. 1979); Southern Parkway Corp. v. Lakewood Park Corp., 106 U.S. App. D.C. 372, 273 F.2d 107, 108 (D.C. Cir. 1959).

Thus, that provision does not, in and of itself, make any portion of the bankruptcy court's order appealable.

C. Interlocutory Appeal Pursuant to 28 U.S.C. § 158(a)(3)

The Clubs argue that the portions of the bankruptcy court's order other than the arbitrability issue are the proper subjects for an interlocutory appeal pursuant to 28 U.S.C. § 158(a)(3), which provides: "The district courts of the United States shall have jurisdiction to hear appeals with leave of the court, from . . . interlocutory orders and decrees . . . ." In determining whether the Court should grant leave to appeal pursuant to this provision, it utilizes the standard set forth in 28 U.S.C. § 1292(b). In re Ionosphere Clubs, Inc., 179 Bankr. 24, 28 (S.D.N.Y. 1995); In re Pan Am Corp., 159 Bankr. 396, 401 (S.D.N.Y. 1993). Pursuant to that statutory provision, granting leave to file an interlocutory appeal is appropriate only where the order appealed from "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and . . . [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation." See Ionosphere Clubs, 179 Bankr. at 28; Pan Am Corp., 159 Bankr. at 401. Moreover, these conditions will exist only in "exceptional circumstances." See Ionosphere Clubs, 179 Bankr. at 28; Pan Am Corp., 159 Bankr. at 401.

Appendix D

Only the bankruptcy court's rulings as to justiciability and the core/non-core issue even arguably satisfy the third criterion. As to the former, it is unclear on this record how far the claims of the Asbestosis Claimants have advanced so as to constitute a live controversy, in light of the settlement of the DSM claims. Because the question of justiciability is highly fact-dependent, and because the record is unclear, the issue of justiciability does not present a controlling question of law and an interlocutory appeal would not be proper. See Genentech, Inc. v. Novo Nordisk A/S, 907 F. Supp. 97, 99 (S.D.N.Y. 1995); Olin Corp. v. Insurance Co. of N. Am., 607 F. Supp. 1377, 1378-79 (S.D.N.Y. 1985).

Moreover, a resolution by this Court of the core/non-core issue will not necessarily "materially advance the ultimate termination of the litigation." If this Court were to hold that the proceedings are non-core, such a holding would disable the bankruptcy court only from "entering appropriate orders and judgments," 28 U.S.C. § 157(b)(1), and would subject its findings of fact and conclusions of law to de novo review in this Court. See 28 U.S.C. § 157(c)(1); In re Orion Pictures Corp., 4 F.3d 1095, 1101 (2d Cir. 1993), cert. dismissed, 114 S. Ct. 1418, 128 L. Ed. 2d 88 (1994); In re Adelphi Inst., Inc., 112 Bankr. 534, 539 (S.D.N.Y. 1990). The bankruptcy court would not be divested of jurisdiction and the proceedings would continue in that court. See, e.g., In re Pied Piper Casuals, Inc., 65 Bankr. 780, 781 (S.D.N.Y. 1986) (reversing bankruptcy court's determination that proceeding is core and remanding to that court as non-core proceeding). Thus, this issue is not a proper subject for an interlocutory appeal.

Accordingly, the Clubs' assertion that the entire bankruptcy order ought to be reviewed on an interlocutory basis pursuant to 28 U.S.C. § 158(a)(3) is without merit.

D. The Collateral Order Doctrine

The Clubs also urge that this Court exercise appellate jurisdiction over the non-appealable portions of the bankruptcy court's order pursuant to the "collateral order" doctrine, first enunciated by the Supreme Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949). In a recent explication of that doctrine, the Supreme Court wrote that the "small category" of non-final orders qualifying as appealable collateral orders "includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." Swint v. Chambers County Commission, 115 S. Ct. 1203, 1208, 131 L. Ed. 2d 60 (1995).

The Court need not enter into an extensive discussion of how many, if any, of the non-appealable issues in this case satisfy either or both of the first two elements of this test, for none satisfies the third criterion. Accordingly, the Court may not exercise appellate jurisdiction over any of the non-appealable issues pursuant to the collateral order doctrine.

E. Pendent Appellate Jurisdiction

The Clubs' main contention is that, because one portion of the March 1995 order may be appealed as of right, all other

portions of that order may be appealed pursuant to the doctrine of "pendant appellate jurisdiction." The controlling case in this area is the opinion of the Supreme Court in Swint, 115 S. Ct. at 1208-12.

In Swint, plaintiffs brought an action pursuant to 42 U.S.C. § 1983 against several police officers, a municipality, and a county commission. See id. at 1206. The district court denied the officers' motion to dismiss on the ground of qualified immunity, and also denied both the city's and the county's motions to dismiss. See id. All defendants appealed. See id. at 1207. The Eleventh Circuit had appellate jurisdiction over the appeals of the individual defendants pursuant to Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817-18, 86 L. Ed. 2d 411 (1985). In addition, the court exercised "pendent appellate jurisdiction" to hear the county's appeal, and reversed the district court's order denying summary judgment to that party. Swint, 115 S. Ct. at 1207. Relying heavily on the lack of statutory authority justifying pendent appellate jurisdiction, the Supreme Court unanimously vacated the Eleventh Circuit's opinion, holding that that court had erred in exercising such jurisdiction. See id. at 1208-12.

However, the Court cited with approval its own past decisions in which they had not "required courts of appeals to confine review to the precise decision independently subject to appeal." Id. at 1211-12. In the Court's penultimate paragraph, it explained:

> We need not definitively or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to

> review, conjunctively, related rulings that are not themselves independently appealable. The parties do not contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter.

Id. at 1212 (emphasis added) (citation omitted).

The Second Circuit has since held that its previous precedents establishing the existence of pendent appellate jurisdiction remain, for the most part, undisturbed by Swint, especially in light of the passage from that opinion cited above. In Kaluczky v. City of White Plains, 57 F.3d 202, 206-07 (2d Cir. 1995), the court wrote:

> An appellate court having jurisdiction over some questions on appeal may exercise its discretion to take pendent jurisdiction over independent nonappealable, but related questions. See Golino v. City of New Haven, 950 F.2d 864, 868-69 (2d Cir. 1991), cert. denied, 505 U.S. 1221, 112 S. Ct. 3032, 120 L. Ed. 2d 902 (1992); San Filippo v. United States Trust Co., 737 F.2d 246, 255 (2d Cir. 1984), cert. denied, 470 U.S. 1035, 105 S. Ct. 1408, 84 L. Ed. 2d 797 (1985). The Supreme Court has recently cautioned that, on an interlocutory appeal from an order rejecting a

> claim of qualified immunity, a claim involving a "pendent party" is an "unrelated question" that cannot be resolved under pendent jurisdiction. However, the Court did not otherwise narrow the scope of pendent jurisdiction, and appeared to contemplate pendent appellate jurisdiction over an independent but related question that is "inextricably intertwined" with the issue of qualified immunity or is "necessary to ensure meaningful review" of that issue.

(emphasis added) (citation omitted).

More recently, the Second Circuit has cautioned that "pendent appellate jurisdiction should be exercised sparingly, if ever." Mancuso v. New York State Thruway Auth., 86 F.3d 289, 292 (2d Cir. 1996). Still, it has echoed the Supreme Court's suggestion that such jurisdiction may be exercised when appellate review of an otherwise non-appealable issue is "inextricably intertwined" with or "necessary to ensure meaningful review" of appealable issues, see id.; Cooper v. Town of East Hampton, 83 F.3d 31, 36 (2d Cir. 1996); Blue v. Koren, 72 F.3d 1075, 1084 n.6 (2d Cir. 1995); Rodriguez v. Phillips, 66 F.3d 470, 482-83 (2d Cir. 1995), and it has actually exercised pendent appellate jurisdiction in at least one instance since Swint was decided, see Blue, 72 F.3d at 1084 n.6. Even where it is permitted, the exercise of pendent appellate jurisdiction is discretionary. Rodriguez, 66 F.3d at 483.[3]

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3. The Court has located no decision of any federal court applying the teachings of Swint in the context of an appeal from an

(Cont'd)

Appendix D

With regard to the Bankruptcy court's rulings regarding the Clubs' motions to dismiss the intervention complaint of the Asbestosis Claimants, the justiciability of the dispute, the triggering of insurance coverage, and the motions to dismiss the claims for punitive damages and attorneys fees, and the claim pursuant to N.Y. Gen. Bus. Law § 349, it is difficult to fathom how these issues are "inextricably intertwined" with the denial of the stay of arbitration, or how resolution of those issues is "necessary to ensure meaningful review" of that issue. The Clubs do not make any colorable arguments to that effect.

However, whether resolution of the core/non-core issue is "inextricably intertwined" with, or "necessary to ensure meaningful review" of, the arbitrability issue is a more complex question to which the Court now turns.

F. Core/Non-Core and its Relation to Arbitrability

The bankruptcy court below wrote that the core/non-core issue was crucial to the question of whether the court had discretion to refuse to give effect to a valid arbitration clause. See In re U.S. Lines, 169 Bankr. at 823-24. However, this Court's review of such questions of law is plenary and it

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(Cont'd)
order of the Bankruptcy court to the district court. However, in at least one pre-Swint case from this district, the court exercised pendent appellate jurisdiction in that context without distinguishing it from the situation in which that doctrine ordinarily applies, viz. an appeal from the district court to the circuit court. See In re River Foal, Inc., 161 Bankr. 568, 570 (S.D.N.Y. 1993). The parties agree that Swint is fully applicable to this case.

therefore must make an independent determination of whether this was a correct view of the law.

The question of what, if any, discretion a court enjoys to deny effect to a valid arbitration clause in a bankruptcy proceeding was most extensively discussed in the decision of the Court of Appeals for the Third Circuit in Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1155-62 (3d Cir. 1989). In that opinion, the court relied upon "the strength of the national policy favoring arbitration clauses, as reflected in the recent Supreme Court cases,"[4] in holding that

> the district court lacked the authority and discretion to deny enforcement of the arbitration clause unless [the party opposing arbitration] had met its burden of showing that the text, legislative history, or purpose of the Bankruptcy Code conflicts with the enforcement of an arbitration clause in a case of this kind, that is, a non-core proceeding brought by a trustee to enforce a claim of the estate in a district court.

Hays, 885 F.2d at 1155-56, 1156-57 (footnotes omitted).

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4. See, e.g., Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989); Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988); Shearson/American Express v. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985); Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

The court then proceeded to determine whether or not Hays had met its burden and concluded that

> Hays has pointed to no provisions in the text of the bankruptcy laws, and we know of none, suggesting that arbitration clauses are unenforceable in a non-core adversary proceeding in a district court to enforce a claim of the estate.
>
> . . . .
>
> Similarly, Hays has identified no legislative history indicating that this kind of proceeding was intended to be an exception to the mandate of the Arbitration Act. . . . Its articulation of the bankruptcy policy that must override the policy favoring arbitration . . . is couched in generalities that lack persuasive force at least in the context of a non-core adversary suit brought to enforce a claim of the estate in a district court.

Id. at 1157 (emphasis added) (footnote omitted).

Virtually every court that has addressed the issue of a bankruptcy court's discretion, if any, to decline to enforce an arbitration clause after Hays has cited that opinion with approval. See In re Gurga, 176 Bankr. 196, 200 (9th Cir. BAP 1994); In re James P. Barkman, Inc., 170 Bankr. 321, 323 (Bankr. E.D. Mich. 1994); In re American Freight Sys., Inc., 164 Bankr. 341, 346-47 (D. Kan. 1994); In re Hupp Indus., Inc., 157 Bankr. 360, 362 (Bankr. N.D. Ohio 1993); In re P & G Drywall and Acoustical Corp., 156 Bankr. 704, 705-06

(Bankr. D. Me. 1993); In re Midwest Communications Corp., 144 Bankr. 354, 355-56 (Bankr. E.D. Ky. 1992); In re Chorus Data Systems, Inc., 122 Bankr. 845, 851-52 (Bankr. D.N.H. 1990). While obviously not bound by that opinion, the Court is persuaded by its reasoning and its general holding that the strong national policy favoring arbitration of disputes sharply curtails or even eliminates the discretion enjoyed by a court to refuse to enforce a valid arbitration clause, even in a bankruptcy proceeding.

However, that does not end the matter, for the question for determination is whether the existence or proper exercise of that discretion is dependent in any significant degree on whether the bankruptcy proceeding is core or non-core. The Hays court clearly relied upon the fact that the proceeding at issue was non-core in concluding that the district court lacked discretion to deny enforcement to a valid arbitration clause. However, the court did not expressly state whether and to what extent its analysis would have differed had the proceeding been core.

It is unclear whether Hays establishes a per se rule that a court utterly lacks discretion to deny effect to a valid arbitration clause in non-core cases, but that it might enjoy such discretion in core cases, and that such discretion must be exercised based on a case-by-case analysis of whether arbitration would conflict with the Bankruptcy Code in light of the facts of the particular case; or whether the court must perform such a case-by-case analysis, regardless of whether the proceeding is core or non-core, but that the fact that a proceeding is non-core weighs heavily in favor of sending the matter to arbitration.

The Court takes no position at this time on which of these readings of Hays is the more accurate statement of the law. Regardless of the ultimate determination of this issue, it will be more likely in a core than in a non-core proceeding that arbitration would conflict with the purposes of the Bankruptcy Code. Thus, the resolution of the issue of whether these proceedings are core or non-core will have a serious -- if not dispositive -- impact on the appealable issue: whether the bankruptcy court erred in refusing to send this matter to arbitration with regard to the four foreign Clubs. See In re Spectrum Info. Technologies, Inc., 183 Bankr. 360, 363 (Bankr. E.D.N.Y. 1995); In re Sacred Heart Hosp. of Norristown, 181 Bankr. 195, 202 (Bankr. E.D. Pa. 1995); Gurga, 176 Bankr. at 200; American Freight Sys., 164 Bankr. at 347; Hupp Indus., 157 Bankr. at 362; Midwest Communications, 144 Bankr. at 356; In re FRG, 115 Bankr. 72, 74 (E.D. Pa. 1990). But see James P. Barkman, Inc., 170 Bankr. at 323 n.1 (dictum); In re Statewide Realty Co., 159 Bankr. 719, 724 (Bankr. D.N.J. 1993).

Thus, the issues are more than simply "related"; there is more than merely "overlap"; in a very real sense, they are "inextricably intertwined," such that resolution of the former issue is "necessary to ensure meaningful review" of the latter, Swint, 115 S. Ct. at 1212, especially in light of the lack of clarity in the law, see Blue, 72 F.3d at 1084 n.6. Accordingly, with regard to the core/non-core issue, and with regard to the four foreign clubs, this case fits within the exception, suggested by the Supreme Court in Swint and embraced by the post-Swint Second Circuit cases, to the general rule against pendent appellate jurisdiction. Moreover, the Court, in its discretion, will exercise that jurisdiction.

Appendix D

F. Pendent Party Appellate Jurisdiction

In light of the fact that the Court possesses, and will exercise, pendent appellate jurisdiction with regard to the core/non-core issue vis-a-vis the Foreign Clubs, the Court must now determine whether it may exercise "pendent party appellate jurisdiction" with regard to the same issue, vis-a-vis the Domestic Clubs, which have no otherwise appealable issue.

Swint itself makes no relevant distinction between pendent appellate jurisdiction and pendent party appellate jurisdiction, except that it notes in passing that the court of appeals in that case "asserted not merely pendent appellate jurisdiction but pendent party appellate jurisdiction." Swint, 115 S. Ct. at 1211 n.6. This does not indicate that the Court disfavors the latter any more than the former. But see Pickens v. Hollowell, 59 F.3d 1203, 1208 (11th Cir. 1995) (reading Swint as eviscerating pendent party appellate jurisdiction while leaving pendent appellate issue jurisdiction "uncertain").

The Second Circuit's opinion in Kaluczky might be read as strictly limiting pendent party appellate jurisdiction as distinguished from pendent appellate jurisdiction. The court interpreted Swint as cautioning

> that, on an interlocutory appeal from an order rejecting a claim of qualified immunity, a claim involving a "pendent party" is an "unrelated question" that cannot be resolved under pendent jurisdiction. However, the Court did not otherwise

> narrow the scope of pendent jurisdiction, and appeared to contemplate pendent appellate jurisdiction over an independent but related question . . . .

Kaluczky, 57 F.3d at 207 (emphasis added) (citation omitted).

However, this passage does not contemplate a situation such as the one presented here, where an issue over which the Court exercises appellate jurisdiction with regard to some parties is identical to an issue over which the Court lacks jurisdiction with regard to other parties. It appears that the "inextricably intertwined" standard applies with equal force to pendent parties as it does to pendent issues, and the putative appeal of the Domestic Clubs could not be more inextricably intertwined with the appeal of the Foreign Clubs than when they involve the same issue. See Eagle v. Morgan, 88 F.3d 620, 1996 WL 375902, at *8 (8th Cir. 1996) (exercising appellate jurisdiction over pendent party where issue presented on pendent party's appeal was coterminous with those properly on appeal, and because disposition of latter necessarily disposed of former); Moore v. City of Wynnewood, 57 F.3d 924, 929-30 (10th Cir. 1995) (same); cf. Brennan v. Township of Northville, 78 F.3d 1152, 1158 (6th Cir. 1996) (indicating that court would have exercised appellate jurisdiction over pendent party had that party appealed). In such a case, there is no danger of the parties "parlaying [appealable] orders into multi-issue interlocutory appeal tickets," Swint, 115 S. Ct. at 1211, because the Court is simply allowing some parties to participate in an appeal of an issue that the Court would otherwise hear in any event.

Moreover, as noted above, Swint does not radically change the law in this circuit, and before Swint, the Second Circuit had on several occasions exercised pendent party appellate jurisdiction. See, e.g., McCowan v. Sears, Roebuck and Co., 908 F.2d 1099, 1104-05 (2d Cir.), cert. denied, 498 U.S. 897, 111 S. Ct. 250, 112 L. Ed. 2d 209 (1990); Barrett v. United States, 798 F.2d 565, 570-71 (2d Cir. 1986); United States v. Tom, 787 F.2d 65, 68 n.3 (2d Cir. 1986).

Finally, if and when it becomes necessary for this Court to decide the core/non-core issue, that determination will become the law of the case, binding all parties in the case, including the Domestic Clubs. See In re Ivan F. Boesky Sec. Litig., 957 F.2d 65, 69 (2d Cir. 1992); Manhattan Eye Ear & Throat Hosp. v. National Labor Relations Board, 942 F.2d 151, 156 (2d Cir. 1991); In re Chateaugay Corp., 136 Bankr. 79, 83 (Bankr. S.D.N.Y. 1992). They should be permitted to present arguments on that issue on their own behalf.

Thus, concerns based on both efficiency and fairness dictate that the Court possesses pendent party appellate jurisdiction in this instance, see Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 679 (D.C. Cir. 1996) (per curiam), and the Court, in its discretion, chooses to exercise that jurisdiction.

CONCLUSION

For the foregoing reasons, appellees' motions to dismiss portions of the appeal are denied to the extent that the Court will exercise appellate jurisdiction over the "core/non-core" issue as to all parties, as well as the issue that is appealable as of right, and the motions are otherwise granted.

Appendix D

Dated: New York, New York

August 16, 1996

SO ORDERED:

SIDNEY H. STEIN, U.S.D.J.

APPENDIX E — MEMORANDUM OF DECISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ON DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT DATED AND DECIDED JULY 1, 1994 AND FILED JULY 5, 1994

In re: UNITED STATES LINES, INC. and UNITED STATES LINES (S.A.), INC. f/k/a MOORE McCORMACK LINES, INC.,

Debtors.

UNITED STATES LINES, INC. and UNITED STATES LINES (S.A.), INC. REORGANIZATION TRUST,

Plaintiff,

ASBESTOSIS CLAIMANTS,

Plaintiff-Intervenors,

v.

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION INC., WEST OF ENGLAND OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., CONTINENTAL INSURANCE CORPORATION, UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON MUTUAL STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, MARINE OFFICE OF AMERICA CORPORATION, and THE TRAVELERS INSURANCE COMPANY,

Defendants.

Appendix E

Case Nos. 86-B-12240, 86-B-12241 Chapter 11,
Adv. Pro. No. 93-8004A

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

169 B.R. 804; 1994 Bankr. LEXIS 1047

July 1, 1994, Decided
July 5, 1994, Filed, Docketed

* * *

JUDGES: Conrad

OPINION BY: FRANCIS G. CONRAD

Memorandum of Decision on Defendants' Motions to Dismiss and for Summary Judgment

Before us[1] are summary judgment motions[2] by eight maritime insurers to dismiss the Trust's complaint on the grounds that the issues presented are, inter alia, nonjusticiable, noncore, inadequately pleaded, worthy of abstention, and, according to several foreign insurers, subject to mandatory arbitration. The motions will be denied in part and granted in part.

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1. Chief Bankruptcy Judge Lifland transferred this adversary proceeding from Bankruptcy Judge Blackshear to us on March 4, 1994, in the interest of maintaining an equitable distribution of cases.

2. Many of the defendants challenge our jurisdiction. We note that we are also obligated to define our jurisdiction under 28 U.S.C. § 157(b)(3). We do so below.

Plaintiff herein, United States Lines, Inc. and United States Lines (S.A.), Inc. Reorganization Trust ("Trust"), is Debtors' successor in interest under a personal injury claims resolution procedure established in Debtor's First Amended and Restated Joint Plan of Reorganization, dated February 23, 1989, as supplemented and amended by order dated February 6, 1990 ("Plan"). The Trust alleges breach of insurance contracts issued to the debtors, United States Lines, Inc. and United States Lines (S.A.) Inc., (collectively, "Debtors") and their successors in interest, and seeks primarily declaratory relief.

The defendants are Debtors' foreign and domestic maritime insurers ("Defendants" or "Clubs").

Background

Debtors are engaged in the worldwide transportation of containerized freight on ocean-going vessels. Throughout their history as one of the world's largest shipping companies, Debtors employed thousands of seafarers to operate and maintain their vessels. Approximately 8000 of Debtors' former employees ("Claimants") have filed 15,000 claims alleging exposure to and injury from asbestos aboard Debtors' ships.[3] The Claimants seek damages for their

3. The health hazards associated with asbestos exposure are well documented. See, e.g., Findley v. Blinken (In re Joint Eastern & Southern Dist. Asbestos Litigation), 129 Bankr. 710, 734-42 (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified on reh'g, 993 F.2d 7 (2d Cir. 1993) (recounting history of asbestos use and cataloging diseases associated with

(Cont'd)

injuries under the Jones Act, 46 U.S.C. § 688, et seq., and the General Maritime Law.

During the forty-year period preceding their petition for relief, Debtors purchased insurance contracts, known as Protection and Indemnity policies ("P&I policies"), from the Clubs. Such policies generally constitute the major form of liability insurance for ocean-going vessels and protect the insured against "liability for bodily injury (including death) or property damage arising out of specified types of accidents, and . . . certain unexpected vessel-related expenditures." A. Flitner & A. Brunck, Ocean Marine Insurance, vol. 1, 27 (2d ed. 1992). See Dicola v. American S.S. Owners Mut. Protection and Indem. Ass'n, Inc. (In re Prudential Lines, Inc.), 148 Bankr. 730, 736-38 (Bankr. S.D.N.Y. 1992) (recounting history of P&I insurance).

The P&I policies relevant here, with minor exceptions, contain the following standard terms and conditions:

> The (Club) agrees to indemnify the assured against any loss, damage or expense which the assured shall become liable to pay and shall pay by reason of the fact that the assured is the owner (or operator, manager, charterer mortgagee, trustee, receiver or agent, as the case may be) of the insured vessel and which shall result from the

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(Cont'd)

asbestos exposure); G. Lordi & L. Reichman, Pulmonary Complications of Asbestos Exposure, 48 Am. Family Physician 1471 (Dec. 1993) (describing various diseases linked to asbestos exposure).

following liabilities, risks, events, occurrences and expenditures:

Liability for loss of life, or personal injury to, or illness of any person.

Liability for costs, charges and expenses reasonably incurred and paid by the assured in connection with any liability insured under this policy, subject, however, to the same deduction that would be applicable under this policy to the liability defended; provided, that if any liability is incurred and paid by the assured as aforesaid, the deduction shall be applied to the aggregate of the claim and expenses.

See Complaint, ¶ 12.

P&I Clubs are mutual insurance associations. In a recent English decision from the House of Lords, Lord Brandon described P&I insurance in the following manner:

> It is the long-established practice of shipowners to enter their ships in protection and indemnity associations (P&I clubs) for the purpose of insuring themselves against a wide range of risks not covered by an ordinary policy of marine insurance. By so entering one or more of their ships in a P&I club shipowners become members of that club. P&I clubs operate on a system of mutual insurance under which the successful claim of one member is paid out of the

> contributions of, and the calls made on, all the members including himself. Each member is accordingly both an insurer and an insured.

Firma C-Trade S.A. v. Newcastle Protection and Indem. Assoc., 2 ALL E.R. 705, 708 (1990). Fewer than twenty P&I clubs exist worldwide. Most if not all Clubs are members of the International Group of Protection and Indemnity Associations, an organization where member clubs share information and intelligence and "most importantly, pool their losses and share in the purchase of reinsurance." A. Flitner & A. Brunck, supra, vol. II, 2 (2d ed. 1992). See Paulyson Cert. I ¶ 11 (American Club, UK Club, Liverpool & London, West of England, and Skuld are known members of the International Group.)

P&I policies often contain a "pay to be paid" or "pay first" provision which, in the event of a shipowner's insolvency and absent creative undertakings, may render the policies unenforceable. See, e.g., Liman v. American S.S. Owners Mut. Protection and Indem. Assoc., 299 F. Supp. 106 (S.D.N.Y.), aff'd, 417 F.2d 627 (2d Cir. 1969), cert. denied, 397 U.S. 936, 90 S. Ct. 946, 25 L. Ed. 2d 116 (1970) (permitted insolvent P&I policy holder to borrow funds necessary to satisfy policy's pay first provision); In re Prudential Lines, Inc., supra, 148 Bankr. at 747-50 (same).

Generally, but with some notable exceptions, a Club would insure Debtors' entire ocean-going fleet for a particular year. Paulyson Cert. I, ¶ 4. Deductibles for each accident or occurrence ranged between $ 250 and $ 100,000. See Complaint, ¶¶ 12, 13. Policy limits also varied from year to year.

Appendix E

Procedural History

Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. on November 24, 1986. Debtors' Plan was confirmed on May 16, 1989.

The Plan as amended transfers all of Debtors' maritime insurance rights to the Trust and the Reorganization Trustee ("Trustee"). See Plan, Art. VII(A)(1)(i) ("U.S. Lines and U.S. Lines (S.A.) will transfer to the USL Reorganization Trust . . . all the insurance rights of such Debtors, including without limitation their protection and Indemnity Coverage . . . .") The Trustee, in turn, must collect all monies owed under applicable insurance policies. See Id. ("The USL Reorganization Trustee shall attempt to secure for the benefit of the holders of the Personal Injury Claims all such insurance rights and Indemnification and Contribution Rights.")

The Trustee is empowered to resolve disputed personal injury claims and to distribute Debtor's assets to personal injury claimants. See United States Lines, Inc. and United States Lines (S.A.), Inc. Reorganization Trust Agreement, ¶ 3.5 (the "Trust Agreement") ("The Reorganization Trustee shall be entitled . . . to enforce such Insurance Rights and Indemnification and Contribution Rights and to receive and retain as Reorganization Trust Assets any payments made with respect to such rights.")

The Plan vests all Trust enforcement powers in the Trustee to collect funds owed by the Clubs:

Appendix E

> The Club[s] shall fund the portion of the Allowed Claim equal to the Allowed Excess P.I. Claims. To the extent any Club shall refuse to consent to such a program, the USL Reorganization Trustee is authorized and directed to bring suit against the Club[s] and to take all reasonable steps to obtain the benefits of Insurance above the deductible and the reimbursement of defense costs exceeding the applicable deductible, including the making of cash payments of Allowed Excess P.I. Claims.

Plan, Art. VII(1)(ii) (emphasis ours). To the extent that allowed claims are not paid with proceeds from Debtors' insurance policies, including maritime P&I policies, the Plan dictates that distributions to prepetition unsecured personal injury claimants are limited to securities issued by the reorganized Debtors. See Plan, Art. V(B)(1), (2), Art. VII(A)(1)(i)-(iv).

On December 8, 1992, Bankruptcy Judge Blackshear "so ordered" a stipulation of conditional settlement ("Stipulation") between the Trust and a group of personal injury claimants represented by Dickstein, Shapiro & Morin ("Dickstein Claimants"). The Stipulation established a revolving cash procedure to satisfy the "pay first" provision in each of the P&I policies. None of the Clubs participated in the settlement process. After Bankruptcy Judge Blackshear approved the settlement with the Dickstein Claimants, the Trust filed this proceeding seeking a declaration of its and the Clubs' rights and obligations under the P&I policies, the Plan, and applicable law.

Appendix E

The Trust alleges ten counts in the Complaint, most of which seek a declaration from us concerning the Clubs' contractual requirements under the P&I policies relative to the various terms and conditions of the Stipulation. Specifically and in summary form, the Trust asks that we determine (1) whether the P&I policies are enforceable contracts, (2) what acts or occurrences trigger coverage, (3) whether the Trust may select from among the triggered P&I policies which policy the Trust wishes to pay certain claims, (4) whether the Trust must satisfy deductibles for each and every P&I policy before a given Club is obligated to indemnify the Trust for an asbestos-related loss (i.e., that deductibles need not be "stacked"), (5) whether the Trust may satisfy all deductibles with reorganization securities, (6) whether the Stipulation's escrow and "Liman" procedures satisfy the policies' "pay first" requirement, (7) whether the Clubs may offset unpaid premiums against their indemnification obligations under different, fully funded policies, (8) whether the American Club must reimburse the Trust for funds paid to settle the Brandenburg claim, (9) whether the UK Club must reimburse the Trust for funds expended in the defense of the Ramos claim, and (10) whether the Clubs are liable for punitive damages and attorneys' fees.

On April 12, 1993, Bankruptcy Judge Blackshear granted the Claimants' motion to intervene under Fed. R. Civ. P. 24 and Fed. R. Bankr. P. 7024. As intervenors, the Claimants filed a companion complaint seeking declarations substantially similar to those sought in the Trust's Complaint.

The Clubs now move for summary judgment. As of this writing, over five years have passed since Debtors' Plan was confirmed.

Appendix E

Discussion

I. Summary Judgment

Fed. R. Civ. P. 56(c), applicable here under Fed. R. Bankr. P. 7056, provides that summary judgment shall be rendered if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The primary purpose in granting summary judgment is to avoid unnecessary trials where no genuine issue of material fact is in dispute. A fact is considered material if it "might affect the outcome of the suit under governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

The moving party bears the burden of showing that there is an absence of evidence to support the nonmovant's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). In determining whether the movant has met its burden, the evidence is considered in a light most favorable to the party opposing the motion. Similarly, all inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-588, 106 S. Ct. 1348, 1356,

89 L. Ed. 2d 538 (1986); United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962); Lendino v. Trans Union Credit Information Co., 970 F.2d 1110, 1112 (2d Cir. 1992).

Our responsibility in considering a motion for summary judgment is not to resolve issues of fact but to assess whether there are factual issues to be tried. Anderson, supra, 477 U.S. at 248-250, 106 S. Ct. at 2509-2511; Brown v. Health Care and Retirement Corp. of America, 25 F.3d 90, 1994 WL 201732 at *1 (2d Cir. 1994); Knight v. United States Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 932, 107 S. Ct. 1570, 94 L. Ed. 2d 762 (1987).

When a motion for summary judgment is made and supported by the movant, Fed. R. Civ. P. 56(e) requires the nonmoving party to set forth specific facts demonstrating that genuine issues of material fact remain for trial. Matsushita, supra, 475 U.S. at 586-87, 106 S. Ct. at 1355, 89 L. Ed. 2d 538 (1986). The nonmovant must set forth the disputed facts in supporting materials, including affidavits, rather than defer to the pleadings alone. First Nat'l Bank of Arizona v. Cities Serv. Corp., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1592-1593, 20 L. Ed. 2d 569 (1968); General Am. Communications Corp. v. Landsell (In re General Am. Communications Corp.), 130 Bankr. 136, 152 (S.D.N.Y. 1991). We note that the Trust has not filed a cross motion for summary judgment. The merits of the Clubs' summary judgment motions are discussed below.

Appendix E

II. Declaratory Judgment Standard

The Clubs argue that there are no justiciable issues before us because the Trust's complaint is premature.[4] We disagree.

Subject to the limits of our jurisdiction,[5] we may issue a declaratory judgment[6] if a proceeding presents an actual case or controversy, or, in the words of the Supreme Court, if

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4. American Club, Travelers, Liverpool, UK Club, and West of England have all alleged in one form or another that the Complaint fails to state a justiciable case or controversy. Several Clubs also attack the standing of the Claimants to bring what the Clubs allege is a direct action. We discuss the standing of the Claimants under the subheading entitled "intervention," infra.

5. The Declaratory Judgments Act, 28 U.S.C. § 2201, infra, is remedial, not jurisdictional. See C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §§ 2754, 2755 (1986 & Supp. 1994). We discuss the limits of our subject jurisdiction at some length below.

6. Section 2201 of Title 28 provides in pertinent part:

> (a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (West Supp. 1992).

> the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941); See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241, 57 S. Ct. 461, 464, 81 L. Ed. 617 (1937) (defining justiciable controversies); see also Keene Corp. v. Fiorelli (In re Joint Eastern and Southern District Asbestos Litigation), 14 F.3d 726, 731 (2d Cir. 1993) (court may enter a declaratory judgment only in favor of a party who has a substantive claim of right to such relief); See also Fed. R. Civ. P. 57; Fed. R. Bankr. P. 7001(9). These standards are inherently fact-intensive and therefore applicable on a case-by-case basis.

A trial court's authority to issue a declaratory judgment is discretionary. In re Joint Eastern and Southern Dist. Asbestos Litigation, 993 F.2d 313, 314 (2d Cir. 1993) (citation omitted). In this Circuit, a trial court

> must entertain a declaratory judgment action [if] the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, or [if a declaration] will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

Continental Casualty Co. v. Coastal Sav. Bank, 977 F.2d 734, 737 (2d Cir. 1992) (citation omitted) (emphasis ours).

Again, if either prong is met, "the declaratory action must be entertained." Id. (emphasis ours).

Following our review of the Complaint and of the parties' respective positions, we find that a sufficient "case or controversy" exists to warrant exercise of our discretion to declare the rights and obligations of the parties.[7] The controversy presented in the Trust's Complaint is immediate and, indeed, obvious. The Stipulation that Bankruptcy Judge Blackshear "so ordered" in 1992 settled 106 claims asserted by the Debtors' former employees and established several procedures to satisfy the "pay first" provisions in the Debtors' P&I policies. Since that time over a year and a half ago, none of the relevant Clubs has stepped forward to reimburse the Trust according to the Stipulation's terms and procedures. As evidenced in the many papers filed in reference to these summary judgment motions, there is little if any common ground uniting the Trust and the Clubs. For example, the Clubs hotly contest whether the "Liman" and escrow procedures outlined in the Stipulation comport with the policies themselves and the law of this Circuit. Until a resolution of this and other collateral issues occurs, no money will change hands and no relief will come to the many parties involved in this proceeding.

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7. Declaratory judgments construing insurance coverage are quite common. See, e.g., Sirius Ins. Co. (UK) Ltd v. Collins, 16 F.3d 34 (2d Cir. 1994) (involving boating insurance); Allstate Ins. Co. v. A.A. McNamara & Sons, Inc., 1 F.3d 133 (2d Cir. 1993) (involving homeowner's policy); In re Prudential Lines, supra, 148 Bankr. at 737 (involving marine P&I insurance).

Therefore, consistent with both factors provided in Continental Casualty, supra, we find that issuance of declaratory judgment pronouncing the rights and obligations of the parties will undoubtedly allay (albeit temporarily, we fear) the many coverage disputes aired in the Complaint and the Clubs' motions for summary judgment. Moreover, these disputes are of sufficient immediacy and reality to ensure that the parties will adequately represent their respective positions for purposes of collateral estoppel and res judicata or, in modern parlance, preclusion. The Clubs' motion on this issue will be denied.

III. Jurisdiction

We next address the Clubs' arguments that this proceeding is noncore under 28 U.S.C. § 157(b)(2).[8] Several Clubs also question our subject matter jurisdiction.[9]

A. Subject Matter Jurisdiction.

Any intelligent discussion of a bankruptcy court's subject matter jurisdiction over state law contract actions must begin with Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) (plurality decision invalidating § 1471 of the Bankruptcy

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8. Continental, Fulton Syndicate, Travelers, Liverpool, Skuld, UK Club, and West of England argue that this proceeding is noncore. We address the Clubs' substantive arguments collectively in our discussion.

9. American Club, Liverpool, and the UK Club argue that we lack subject matter jurisdiction over this proceeding.

Reform Act of 1978). The Supreme Court opined that Bankruptcy courts have limited jurisdiction to hear state law contract actions and other proceedings involving so-called private rights, i.e., "the liability of one individual to another." Id., 458 U.S. at 67-70, 102 S. Ct. at 2869-2871. See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450, n.7, 97 S. Ct. 1261, 1266, n.7, 51 L. Ed. 2d 464 (1977) (defining private rights) (citation omitted). In striking down § 1471 of the 1978 Bankruptcy Act, the Supreme Court held that Congress could not confer Article III authority over private rights to a specialized non-Article III court. Marathon, supra, 458 U.S. at 74, 102 S. Ct. at 2873. The Court wrote

> the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages. . . . The former may well be a "public right," but the latter obviously is not.

Id., 458 U.S. at 71, 102 S. Ct. at 2871.

Under Marathon and its scion, Article I courts have considerably more authority to decide disputes involving so-called public rights, i.e., cases that arise between the Government and the persons subject to its authority, than to resolve private rights issues between individuals. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51, 109 S. Ct. 2782, 2795-96, 106 L. Ed. 2d 26 (1989) (defining public rights as situations where "the Government is involved

in its sovereign capacity under an otherwise valid statute[.]") (footnote omitted); See also Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593-94, 105 S. Ct. 3325, 3337, 3339-40, 87 L. Ed. 2d 409 (1985) (holding that pesticide registration is a public right); Crowell v. Benson, 285 U.S. 22, 50, 52 S. Ct. 285, 292, 76 L. Ed. 598 (1932) (public rights doctrine extends to matters arising "between the government and the persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."). Without holding on the issue, the Supreme Court assumed that the "restructuring of debtor-creditor relations" qualifies as a public right. Granfinanciera, supra, 492 U.S. at 56, n.11-12, 109 S. Ct. at 2798 n.11-12.

In Thomas, supra, the Supreme Court summarized its holding in Marathon in the following manner: "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." Thomas, 473 U.S. at 584, 105 S. Ct. at 3334. More important, the Court stated that Article I courts could resolve private disputes that were closely related to or substantively entangled with regulatory and governmental interests. "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." Id., 473 U.S. at 593-94, 105 S. Ct. at 3339-40. See Germain v. Connecticut Nat'l Bank, 988 F.2d 1323, 1331

(2d Cir. 1993) (noting that public rights doctrine may apply to private rights that are inextricably intertwined with public rights). Assuming that the restructuring of debtor-creditor relations is a public right, then presumably a bankruptcy court, despite its Article I limitations, could resolve a state law breach of contract action against a stranger to the bankruptcy case if the contract action is inseparably and inextricably intertwined with the restructuring of debtor-creditor rights.[10]

In the post-Marathon era, title 28 § 1334 defines the tripartite grant of subject matter jurisdiction in bankruptcy cases and proceedings.[11] First, in response to the constitutional concerns penned by the plurality in Marathon, supra, § 1334(a) vests "original and exclusive jurisdiction" over bankruptcy cases in the district court. Second, under 28 U.S.C. § 1334(d), district courts have "exclusive jurisdiction" over all the debtor's property "wherever located." And third, in "all civil proceedings arising under title 11, or arising in or related to cases under title 11," district courts exercise "original but not exclusive jurisdiction." 28 U.S.C. § 1334(b).

District courts may refer all cases arising under title 11 and all proceedings related to or arising in a case under title 11 to the bankruptcy judges in their district. 28 U.S.C. § 157(a).

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10. We note that many state court judges not appointed for life and with terms shorter than our own routinely adjudicate contract actions.

11. See generally A. Ostrow, Constitutionality of Core Jurisdiction, 68 Am. Bankr. L.J. 91 (1994) (discussing bankruptcy court jurisdiction).

Appendix E

All district courts have adopted general orders referring cases under title 11 to their respective bankruptcy courts. See, e.g., Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York, July 10, 1984 (Ward, Acting C.J.).

Subject matter jurisdiction under § 1334(b) is considered expansive in scope. Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.), 980 F.2d 110, 114 (2d Cir. 1992). Following referral to the bankruptcy court under 28 U.S.C. § 157(a), core and noncore matters are subsumed within the court's subject matter jurisdiction. A. Ostrow, supra, 68 Am. Bankr. L.J. at 114 n.178.

The threshold determination for bankruptcy court subject matter jurisdiction is whether the proceeding is "related to" the case under title 11. Disputes within "arising in" or "arising under" jurisdiction are, a fortiori, within "related to" jurisdiction. Courts apply a liberal standard to determine whether a proceeding is related to a bankruptcy case. See, e.g., In re Cuyahoga Equip. Corp., supra, 980 F.2d at 114 ("the test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome might have a 'conceivable effect' on the bankruptcy estate."); Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) ("the usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."). After a finding that a proceeding is related to a case, courts then address the core issue under 28 U.S.C. § 157(b)(2). See Celotex Corp. v. AIU Ins. Co. (In re Celotex

Corp.), 152 Bankr. 667, 671-672 & n.6 (Bankr. M.D. Fla. 1993) ("ultimately, once there is a determination that the matter is 'related to' the bankruptcy case, the bankruptcy court has subject matter jurisdiction and the inquiry immediately proceeds to the question of whether the matter is core.") (citations omitted).

Before addressing the merits of the arguments advanced by the individual Clubs concerning our subject matter jurisdiction over this proceeding, we note that of all the Clubs, only the American Club filed a proof of claim against the Debtors for unpaid premiums and assessments.[12] This voluntary act alone defeats the American Club's arguments disputing our subject matter jurisdiction.

"It is well settled that by filing a proof of claim in a bankruptcy case, a creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting the filing creditor to the bankruptcy court's equitable jurisdiction." In re Best Products Co., Inc., 168 Bankr. 35, 1994 WL 32371 at *32 (Bankr. S.D.N.Y. 1994) (Brozman, J.), citing, e.g., Langencamp v. Culp, 498 U.S. 42, 44, 111 S. Ct. 330, 331, 112 L. Ed. 2d 343 (1990); Granfinanciera, supra, 492 U.S. at 58-59 & n.14, 109 S. Ct. at 2798-2799 & n.14, 106 L. Ed. 2d 26 (1989); First Fidelity Bank, N.A., New Jersey v. Hooker Invs., Inc. (In re Hooker Invs., Inc.), 937 F.2d 833, 838 (2d Cir. 1991). If a creditor files a proof of claim and is then sued by a debtor- in-possession or trustee, then that action becomes part of the claims allowance process, which is triable only in equity. Langenkamp, supra, 498 U.S. at 44,

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12. See Paulyson Cert. II, Ex. M.

111 S. Ct. at 331 (citation omitted). See Travellers Int'l AG. v. Robinson, 982 F.2d 96, 98, 100 n.5 (3d Cir. 1992), cert. denied, __ U.S. __, 113 S. Ct. 1946, 123 L. Ed. 2d 651 (1993) (holding that the filing of a claim waives the right to jury trial and an Article III judge.) We therefore have subject matter jurisdiction over the Trust's action against the American Club.

Our subject matter jurisdiction over the remaining seven Defendants requires only a brief analysis.

We begin with the Plan itself. The Trust is a significant component of Debtor's ongoing reorganization. The Plan unequivocally provides for the retention of the bankruptcy court's exclusive jurisdiction to decide essentially all "controversies and disputes regarding the interpretation or enforcement of the terms of the Plan [and] the [Trust.]" and "the adjudication of any causes of action . . . under the Bankruptcy Code . . . brought by . . . the [Trust.] Plan, Art. XIII, ¶¶ D, G.

"[A] bankruptcy court retains post-confirmation jurisdiction in a chapter 11 proceeding only to the extent provided in the plan of reorganization." Hospital and Univ. Property Damage Claimants v. Johns-Manville Corp. (In re Johns-Manville Corp.), 7 F.3d 32, 34 (2d Cir. 1993). Despite this broad statement and the sweeping retention provisions listed in Article XIII of the Plan, a bankruptcy court obviously cannot expand its subject matter jurisdiction beyond the jurisdictional grant provided in 28 U.S.C. § 1334. Portfolio Lease Funding Corp., No. 1 v. Seagate Technology, Inc. (In re Atlantic Computer Sys., Inc.), 163 Bankr. 704, 707

(Bankr. S.D.N.Y. 1994). It is also clear, in light of the language quoted above, that the Court retains all subject matter jurisdiction to the extent that it exists. See Plan, Art. XIII, ¶¶ D, G.

After considering all the parties' arguments and the cases cited above, we find that this proceeding is at least related to the Debtors' case and therefore within our subject matter jurisdiction under 28 U.S.C. § 1334(b). See, e.g., In re Cuyahoga Equip. Corp., supra, 980 F.2d at 114. The Trust's declaratory action is fundamental to the distribution of the estate's property and its allocation among the various Claimants. Moreover, the Trust's obligations under the Plan clearly relate to the Debtors' case and reorganization because the P&I policies are property of the Debtors' estate and, by way of the Plan and Confirmation Order, constitute the res of a disbursement trust. Our jurisdiction over property of the estate is, of course, beyond reproach under 28 U.S.C. § 1334(d) and numerous court decisions. See, e.g., MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 91 (2d Cir.), cert. denied, 488 U.S. 868, 109 S. Ct. 176, 102 L. Ed. 2d 145 (1988) ("It is well established that a bankruptcy court has jurisdiction over all of the property of the debtor's estate, wherever located.") (citations omitted).

B. Core Jurisdiction.

Having found subject matter jurisdiction, we next address the Clubs' contention that this proceeding is noncore.

Core proceedings include all proceedings integral to the restructuring of debtor-creditor rights, whether or not they

involve questions of state law, and all proceedings in which the right to relief is created by title 11 of the United States Code. According to one well-respected commentator, "the only types of proceedings which are excluded from core treatment are those which arise out of causes of action owned by the debtor at the time the title 11 case is filed and those between third parties related to the bankruptcy estate." 1 L. King, Collier on Bankruptcy ¶ 3.01 at 3-49 & n.95 (15th ed. 1994). Neither of these exclusions exists herein.

Relying on the recent Second Circuit decision, Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures, Inc.), 4 F.3d 1095 (2d Cir. 1993), cert. dismissed, __ U.S. __, 114 S. Ct. 1418, 128 L. Ed. 2d 88 (1994), the Clubs argue that bankruptcy courts, with their limited Article I grant from Congress, cannot issue final orders in any dispute arising from a prepetition contract. We note that the issue presented here--whether a postpetition, postconfirmation breach of a prepetition insurance contract is a core matter--has not been resolved in light of recent Second Circuit decisions that may restrict our ability to decide state law contract actions.

The Trust argues that the Complaint raises core issues under § 157(b)(2)(A), (B), and (O) because (1) the Trust is a direct product of the Debtors' chapter 11 case; (2) the Plan retained bankruptcy court jurisdiction to resolve all disputes involving the Trust; (3) the P&I policies are property of the estate; and (4) the alleged breach of contract occurred postpetition during implementation of the Plan.

The jurisdiction of the bankruptcy court over core proceedings is set forth in 28 U.S.C. § 157(b)(1):

> bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section and may enter appropriate orders and judgments.

Id. The phrases "arising in" and "arising under" are terms of art. See 57 H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 445-446 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 6400-6401 (discussing "arising under" jurisdiction); 1 L. King Collier on Bankruptcy ¶ 3.01 at 3-32 (15th ed. 1994) (discussing matters within "arising in" jurisdiction).

The bankruptcy courts may enter final orders in core proceedings. In contrast, any determinations by the bankruptcy court in a related noncore proceeding, upon timely objection, are subject to de novo review by the district court. 28 U.S.C. § 157(c)(1); Ben Cooper, Inc. v. Insurance Co. of the State of Pa. (In re Ben Cooper, Inc.) 896 F.2d 1394, 1397-1398 (2d Cir.), vacated and remanded on other grounds, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 408 (1990), reinstated on remand, 924 F.2d 36 (2d Cir.), cert. denied, 500 U.S. 928, 111 S. Ct. 2041, 114 L. Ed. 2d 126 (1991). Numerous courts and commentators have analyzed the origins, applications, and limits of core jurisdiction. For the sake of brevity, we do not repeat their holdings here.

Section 157(b)(2) of title 28 classifies certain matters as core proceedings. The list is nonexclusive. Two of this section's catchall subsections are relevant here. Under § 157(b)(2)(A),

"matters concerning the administration of the estate" are core. And under § 157(b)(2)(O), "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or equity security holder relationship, except personal injury tort or wrongful death claims" are also core.[13]

Despite their broad implications, "matters concerning the administration of the estate" and "proceedings affecting the liquidation of the assets of the estate" are construed in light of Marathon's jurisdictional limitations. Ben Cooper, supra, 896 F.2d at 1398. Our Circuit has defined these jurisdictional and constitutional limits in several decisions.

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13. The Trust also raises § 157(b)(2)(B) as supporting core jurisdiction. In response, the Clubs argue that the proceeding involves personal injury claims over which we have no jurisdiction. The Clubs' concerns are, however, misdirected.

Clearly, this proceeding is a declaratory judgment action against the Debtors' prepetition insurers seeking resolution of certain coverage disputes, not a proceeding for the estimation or liquidation of personal injury claims. "[Although] the cases are clear that a bankruptcy court may not hear proceedings to liquidate or estimate personal injury tort or wrongful death claims for the purpose of determining the distribution payable to such claimants[,] the estimation of such claims by a bankruptcy court for other purposes, such as determining the feasibility of the debtor's plan of reorganization, is permissible and [may constitute] a 'core' proceeding." In re Chateaugay Corp., 111 Bankr. 67, 72 (Bankr. S.D.N.Y. 1990), aff'd in relevant part, 146 Bankr. 339 (S.D.N.Y. 1992) (citations omitted); see also Roberts v. Johns-Manville Corp. (In re Johns-Manville Corp.), 45 Bankr. 823, 825-826 (S.D.N.Y. 1984) (estimation of personal injury claims for purposes other than distribution are within core jurisdiction.)

Most recently, in Orion, supra, 4 F.3d at 1102, the Second Circuit held, inter alia, that the bankruptcy court lacked core jurisdiction over a prepetition contract dispute where the defendant had not filed a proof of claim.[14] The Court

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14. Orion also held that it was error for the bankruptcy court to decide a disputed factual issue in the context of determining whether the debtor could assume an executory contract. Id., 4 F.3d at 1098-1099 ("At heart, a motion to assume should be considered a summary proceeding, intended to efficiently review the trustee's or debtor's decision to adhere to or reject a particular contract in the swift administration of the bankruptcy estate. It is not the time or place for prolonged discovery or a lengthy trial with disputed issues.") This aspect of Orion is inconsistent with actual practice and restricts the bankruptcy courts' ability to decide factual issues in motions to assume executory contracts. Compare, e.g., Hart Envtl. Management Corp. v. Sanshoe Worldwide Corp. (In re Sanshoe Worldwide Corp.), 993 F.2d 300, 305 (2d Cir. 1993) (finding that bankruptcy courts must make "specific findings" before approving assumption or rejection of contract); In re National Sugar Refining Co., 21 Bankr. 196, 198 (Bankr. S.D.N.Y. 1982) (holding that 11 U.S.C. § 365 authorized bankruptcy courts to resolve questions involving the validity of contracts.) If the Sanshoe fits, wear it.

Orion also ignores Fed. R. Bankr. P. 6006 and 9014, which provide that motions to assume executory contracts are contested matters in which many of the Part VII adversary proceeding rules apply, including the right to engage in full discovery. A. Kornberg & E. Schuchardt, Jurisdiction of the Bankruptcy Courts and Procedural Matters, Am. Bankr. Inst., Fourth Annual Bankruptcy Battleground, Current Developments Panel, 4-7 (Feb. 23, 1994) (seminar materials). The ability to develop facts in a contested matter strongly suggests the authority to resolve those facts in the same proceeding. S. Shimshak & S. Esbin, Motions to Assume: Court Invites Delays and Debtor Risk, The Bankruptcy Strategist, Jan. 1994, at 5.

cautioned that § 157(b)(2)(A) should not be construed so broadly as to "swallow the rule" announced in Marathon. Id., 4 F.3d at 1102. Unlike the facts asserted in the Trust's Complaint, however, Orion involved an alleged prepetition breach of contract, rather than a postpetition breach. Orion is therefore distinguishable from the issue before us in at least that respect.

An earlier Second Circuit decision, Ben Cooper, supra, 896 F.2d at 1400, held that state law contract actions are within the bankruptcy court's core jurisdiction under 28 U.S.C. § 157(b)(2)(A) ("matters concerning administration of the estate") when the contract was entered into postpetition. Id. ("the adjudication of such claims is an essential part of administering the estate.") The Court expressly limited Marathon to claims arising prepetition and declined to apply the rule to claims involving contracts entered into postpetition. Id. at 1400.

Ben Cooper involved a commercial insurance policy that the debtor obtained postpetition. Following a fire at one of the debtor's facilities, the insurer denied coverage and alleged that the debtor misrepresented and omitted material information in the policy application.

Quoting extensively from First Circuit Chief Judge Breyer's decision in Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.), 815 F.2d 165, 168 (1st Cir. 1987), and employing "the traditional tools of statutory construction," the Second Circuit wrote that bankruptcy jurisdiction "was to be construed as broadly as possible within the constitutional constraints of Marathon." Ben Cooper, 896

F.2d at 1398. The Court noted that certain facts were particularly persuasive in its finding that core jurisdiction existed over postpetition contract actions under 157 U.S.C. § 157(b)(2)(A). Again citing Arnold Print Works, the Court observed that trustees and debtors-in-possession are officers of the bankruptcy court, and that postpetition contracts with a debtor-in-possession are "integral" to estate administration. Ben Cooper, supra, 896 F.2d at 1399. Moreover, the Court wrote that the insured building was property of the estate and that plan confirmation was premised, at least in part, on adequate insurance. Id. (citations omitted).

The Second Circuit emphasized the postpetition timing of the alleged cause of action in support of its conclusion that a bankruptcy court has core jurisdiction over certain postpetition state law contract actions. See Id., 896 F.2d at 1400 ("the timing of a dispute may render it uniquely a bankruptcy case."); see also Kenston Management Co., Inc. v. Lisa Realty Co. (In re Kenston Management Co., Inc.), 137 Bankr. 100, 105 (Bankr. E.D.N.Y. 1992) ("the point at which a claim arises is a critical element in determining whether a proceeding is core or noncore.") (citing Ben Cooper). The Second Circuit interpreted Marathon as applying "to claims arising prepetition" and declined to apply Marathon's holding to claims involving contracts entered into postpetition. Ben Cooper, supra, 896 F.2d at 1400. Contra, Beard v. Braunstein, 914 F.2d 434, 443-445 (3rd Cir. 1990) (distinguishing both Ben Cooper and Arnold Print in a matter involving both prepetition and postpetition breach of a prepetition rental contract).

Ben Cooper is noteworthy in at least one other respect. Following its holding that actions concerning postpetition contracts are core, the Second Circuit specifically declined to follow two decisions from the Fifth and Ninth Circuits which narrowly construed the so-called catchall provisions in 28 U.S.C. § 157(b)(2)(A) and (O). See Piombo Corp. v. Castlerock Properties (In re Castlerock Properties), 781 F.2d 159, 162 (9th Cir. 1986) ("state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B) [through] (N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provision [in] § 157(b)(2)(A) and (O)."); Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987) ("a proceeding is core under [§] 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.") The Court preferred to read the general provision in § 157(b)(2) in such a manner as not to render them null. Ben Cooper, 896 F.2d at 1400.

The facts alleged by the Trust are chronologically somewhere between those at issue in Orion and in Ben Cooper. Here, the Trust alleges postpetition breach of insurance policies entered into prepetition. Ben Cooper's broad interpretation of core jurisdiction under § 157(b)(2)(A), however, lends strong support to the Trust's position that the issues before us are core.

After Ben Cooper, the Second Circuit issued a decision on facts analogous to those alleged in the Trust's Complaint. In St. Clare's Hosp. and Health Center v. Insurance Co. of N. Am., (In re St. Clare's Hosp. and Health Center), 934

F.2d 15 (2d Cir. 1991), the Court of Appeals affirmed verbatim Chief Bankruptcy Judge Lifland's decision holding that the debtor's postpetition, postconfirmation suit to enforce a debtor's rights under a prepetition insurance policy was a core proceeding. There, the chapter 11 debtor-hospital sought a declaration that its insurer was obligated to defend and indemnify it under a prepetition insurance policy in a medical malpractice action filed over two years after confirmation of the plan of reorganization.

The chronology of events in St. Clare's is significant. The hospital filed its chapter 11 petition in 1982 and a plan of reorganization was confirmed approximately a year later. The plan provided for the "retention of jurisdiction by the United States Bankruptcy Court for the Southern District of New York of all matters pertaining to the execution of the Plan, including the settlement of, and/or objection to claims." Id., 934 F.2d at 17. On June 28, 1985, over two years after confirmation, an individual commenced suit in state court against the hospital alleging personal injuries arising from medical malpractice that occurred in 1967. Soon thereafter, the hospital notified the underwriter that had insured it against professional liability during 1967. The hospital then commenced an adversary proceeding in the bankruptcy court seeking a declaration that its insurer was obligated to defend and indemnify. The Second Circuit Court of Appeals, overturning the District Court, affirmed the opinion of Chief Bankruptcy Judge Lifland and held that the hospital's declaratory action to enforce its rights under a prepetition insurance policy was a core proceeding under 28 U.S.C. § 157(b)(2). Id. at 18-19.

Appendix E

In support of core jurisdiction, Chief Bankruptcy Judge Lifland cited a number of cases where a chapter 11 debtor's rights under its insurance policies are property of the debtor's estate under § 541(a) of the Bankruptcy Code. Id., 934 F.2d at 18-19, citing, e.g., Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.), 26 Bankr. 420, 436 (Bankr. S.D.N.Y. 1983), aff'd, 40 Bankr. 219, 230 (S.D.N.Y. 1984), aff'd sub nom., MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 92 (2d Cir. 1988), cert. denied, 488 U.S. 868, 109 S. Ct. 176, 102 L. Ed. 2d 145 (1988). More recent decisions reach a similar conclusion. See, e.g., First Fidelity Bank v. McAteer, 985 F.2d 114, 116-117 (3d Cir. 1993) ("This Court has held that insurance policies are property of the estate 'even though the policy has not matured, has no cash surrender value and is otherwise contingent.' ") (citation omitted); Houston v. Edgeworth (In re Edgeworth), 993 F.2d 51, 55 (5th Cir. 1993) ("courts are generally in agreement that an insurance policy will be considered property of the estate.") (footnote and citations omitted). Moreover, prior to the Second Circuit's ruling in Johns-Manville, supra, 837 F.2d at 92, courts in at least four other circuits have held that insurance coverage is property of the bankruptcy estate. National Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.), 837 F.2d 325 (8th Cir. 1988); Tringali v. Hathaway Mach. Co., 796 F.2d 553 (1st Cir. 1986); A.H. Robins Co., Inc. v. Piccinin (In re A.H. Robins Co., Inc.), 788 F.2d 994 (4th Cir.), cert. denied, 479 U.S. 876, 107 S. Ct. 251, 93 L. Ed. 2d 177 (1986); Minoco Group of Cos., Ltd. v. First State Underwriters Agency of New England Reins. Corp. (In re Minoco Group of Cos., Ltd.), 799 F.2d 517 (9th Cir. 1986).

Indeed, a number of courts have held that postpetition breach of contract actions are core proceedings because they concern the administration of the estate. District Judge Cabranes's decision in Caplan v. Liberty Mut. Ins. Co. (In re Century Brass Prods., Inc.), 1992 U.S. Dist. LEXIS 1277, 1992 WL 22191 (D. Conn. 1992) is a good example. There, following confirmation of a reorganization plan, the plan administrator sued the debtor's general liability insurers for their postpetition refusal to pay on policies that the debtor had purchased prepetition. The underlying facts concerned an administrative order issued to the debtor prior to confirmation. Compliance with the administrative order resulted in expenses and losses for the bankruptcy estate, which the plan administrator sought to recover from the debtor's insurers. The insurers argued that the proceeding was noncore.

District Judge Cabranes adopted the holding in a Pennsylvania case, Valley Forge Plaza Assocs. v. Fireman's Fund Ins. Co., 107 Bankr. 514, 517-518 (E.D. Pa. 1989), and held that a postpetition breach of contract claim on a prepetition insurance policy is a core proceeding. Century Brass, supra, 1992 U.S. Dist. LEXIS 1277, *7, 1992 WL 22191 at *2. We reached a similar conclusion in General Am. Communications Corp. v. Landsell (In re General Am. Communications Corp.), 130 Bankr. 136, 155-156 (S.D.N.Y. 1991) (adopting our recommendation that postpetition breach of prepetition contract gave rise to core jurisdiction under 28 U.S.C. § 157(b)(2)(A)).

In light of the above decisions, there is no doubt as a matter of law that the P&I policies are property of the estate following

the entry of the order for relief. And there is also no doubt, and we so hold, that the policies continue to exist as property of the estate despite confirmation of the Debtors' plan of reorganization and the transfer of the policies to a disbursement trust. Our reasons for so holding are factual and, indeed, unique to the resolution of mass toxic tort claims in chapter 11 reorganizations. As in Johns-Manville,[15] A.H. Robins,[16] and to

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15. Johns-Manville Corp., once the world's largest producer of asbestos, is perhaps the seminal bankruptcy case involving toxic tort claims. See, e.g., MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 837 F.2d 89, 93 (2d Cir.), cert. denied, 488 U.S. 868, 109 S. Ct. 176, 102 L. Ed. 2d 145 (1988) (insurance policies are "inseparable" from the claims base and well within the bankruptcy court's jurisdiction over the debtor's assets.) Manville's factual twists and procedural turns read like a history of bankruptcy law and are well beyond the scope of this discussion. See, most recently, Hospital & Univ. Property Damage Claimants v. Johns-Manville Corp. (In re Johns-Manville Corp.), 7 F.3d 32 (2d Cir. 1993).

16. A.H. Robins Company was forced into bankruptcy after claimants filed thousands of personal injury actions related to Robins's manufacture of the Dalkon Shield contraceptive. In A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986), the debtor sought, inter alia, a declaration that its liability insurance policy was an asset of the estate "in which all Dalkon shield plaintiffs and claimants had an interest" and an injunction against all non-bankruptcy court actions with respect to the relevant insurance, particularly against nondebtor defendants. Id., 788 F.2d at 997. The Fourth Circuit Court of Appeals adopted the view expressed in Johns-Manville and centralized all insurance proceedings. Id. at 1001, quoting In re Johns-Manville Corp., supra, 40 Bankr. at 229 (insurance policies constitute "the most important asset of (the debtor's) estate.")

a lesser extent, Prudential Lines,[17] the negotiation and liquidation of countless personal injury claims would have delayed confirmation of a plan for years — at the expense of other creditors and general policy goals favoring prompt corporate rehabilitation.[18]

Again, the unique facts of this proceeding play a key role in our holdings. Asbestos-related diseases are insidious and late-manifesting, thereby necessitating the existence and maintenance of a claims allowance process to compensate individuals whose injuries manifest anywhere from ten to forty years following initial exposure. Here, the Plan created the Trust to manage the special administrative concerns inherent in any chapter 11 case involving a large number of insidious personal injury claims.

In Celotex Corp. v. AIU Ins. Co. (In re Celotex Corp.), 152 Bankr. 667 (Bankr. M.D. Fla. 1993), a proceeding that factually parallels the one now before us, Bankruptcy Judge Baynes held that core jurisdiction existed to decide a debtor's declaratory judgment action against its prepetition insurer.

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17. Prudential Lines, Inc. filed for bankruptcy in 1986. To facilitate confirmation, Prudential Lines's plan of reorganization created a disbursement trust to pay allowed asbestos-related personal injury claims asserted by the debtor's former employees. See In re Prudential Lines, Inc., supra, 148 Bankr. 730. No distributions have yet been made, in large part because of legal foot-dragging by the parties involved.

18. Tobacco companies may be next to seek chapter 11 protection. Tobacco Giants May Turn to Bankruptcy, Experts Say, L.A. Times, June 1, 1994, at D2, col. 3.

The decision is, in large part, grounded on findings that the relevant policies were property of the estate and essential to the debtor's reorganization — facts that, according to the court, triggered the court's core jurisdiction over a Congressionally created public right. The court distinguished collection actions, which it viewed as noncore, from proceedings seeking declaratory relief. In actions pertaining to property of the estate, the court concluded that a presumption exists that declaratory proceedings are core. Id., 152 Bankr. at 673 n.9 & 674. ("where the action brought in a chapter 11 case by the debtor-in-possession is a declaration of rights and not a mere state contract action, then the presumption of core continues.") We generally agree.

As in Celotex, we find that the Debtors' insurance policies are property of the estate earmarked for distribution to a major class of claimants. The Debtors' P&I policies are essential to the integrity of the Trust and to the Debtors' ability to reorganize. The strong nexus that exists between the Trust's adversary proceeding and the general reorganizational process renders this declaratory action core under 28 U.S.C. § 157(b)(2)(A) and (O). Summary judgment for the Clubs will be denied.

V. Coverage Trigger

As noted earlier, the Trust has not moved for summary judgment on any of the counts alleged in the Complaint. At least one declaration sought in the Complaint, however, raises only legal issues and, we find, is ripe for disposition sua sponte pursuant to Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S. Ct. 2548, 2554,

91 L. Ed. 2d 265 (1986) ("district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence.") (citations omitted); LTV Corp. v. AM General Corp. (In re Chateaugay), 154 Bankr. 843, 852 (Bankr. S.D.N.Y. 1993) ("Where there are no disputed issues of material fact and the nonmoving party is entitled to judgment as a matter of law, a court may sua sponte enter judgment against a party moving for summary judgment.") (citations omitted). The Trust, as a nonmovant, will have ten days from the entry of an order to file objections to summary judgment. See generally 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2720, 27-28 (1983 & 1994 Supp.).

Count 8, in part, seeks a declaration that the following three events trigger coverage under the applicable P&I policies: (1) exposure to asbestos; (2) "exposure-in-residence" or "continuous trigger," i.e., the cumulative period following initial exposure during which asbestos-related disease progresses; and (3) manifestation of asbestos-related disease. See Complaint at ¶ 82. All three examples reflect the variety of analyses employed to determine when coverage arises in asbestos litigation. See, e.g., Commercial Union Ins. Co. v. Sepco Corp., 765 F.2d 1543 (11th Cir. 1985) (asbestos exposure triggers coverage); Eagle-Picher Indus. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1028, 103 S. Ct. 1279, 75 L. Ed. 2d 500 (1983) (manifestation of disease triggers coverage); and Keene Corp. v. Insurance Co. of N. Am., 215 U.S. App. D.C. 156, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007, 102 S. Ct. 1644, 71 L. Ed. 2d 875, 102 S. Ct. 1645 (1982)

(inhalation exposure, exposure in residence and manifestation all trigger insurance coverage).

In Prudential Lines, supra, 148 Bankr. at 742, we confronted the trigger issue and concluded that New York law applies an "injury-in-fact" trigger:

> We find that federal courts applying New York law adopt the "injury-in-fact" theory as triggering coverage under a CGL policy. See, Maryland Casualty Co. v. W.R. Grace & Co., 794 F. Supp. 1206 (S.D.N.Y. 1991) (and cases cited therein). The injury-in-fact theory was first advanced in American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983), aff'd as modified, 748 F.2d 760 (2d Cir. 1984) ("AHP"). In AHP, Judge Sofaer held that actual injury during the relevant policy period triggers coverage under New York law. In other words, at the time an injury actually occurs, the applicable policy is, in effect, triggered. It is of no consequence whether the injury has been discovered or not. According to AHP, "a real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became [diagnosable]." AHP, 748 F.2d at 766 (quoting AHP, 565 F.Supp. 1485, 1497 (S.D.N.Y. 1983)). Applying the above standard to P & I policies, we hold that injury-in-fact during the policy period triggers coverage.
>
> (emphasis added)

State and federal decisions issued after Prudential Lines have buttressed our conclusion there. For example, the New York Court of Appeals recently wrote "Federal courts have concluded that the 'injury-in-fact' rule is most consistent with New York law." Continental Casualty Co. v. Rapid-American Corp., 80 N.Y.2d 640, 650-1, 609 N.E.2d 506, 511, 593 N.Y.S.2d 966, 971 (1993). We therefore grant summary judgment and hold that injury-in-fact during applicable policy years triggers coverage under the Debtors' P&I policies. The factual issue of when injury-in-fact occurs remains in dispute.[19]

V. Arbitration

Four foreign Clubs object to the Complaint on the grounds that their rules require arbitration of all disputes between individual Clubs and member shipowners.[20] The Clubs cite to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

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19. The parties in Prudential Lines stipulated that exposure to asbestos causes injury. See In re Prudential Lines, Inc., supra, 148 Bankr. at 740. The Trust and the Clubs here have not so stipulated.

20. Liverpool & London, the UK Club, West of England, and Skuld argue that the Trust is bound by applicable arbitration agreements. See Answer of Liverpool & London to Adversary Complaint, ¶¶ 10, 13, 44, Affirmative Defenses IV, VIII, XIV, XVI, XVII, XVIII, XX; UK Club Answer to Adversary Complaint ¶ 53; West of England Answer to Complaint ¶¶ 53, 57, 82, Ninth Affirmative Defense. See also West of England Motion, Ex. A at ¶ 3. SKULD moves for arbitration limited to "the purview of its protection and indemnity insurance coverage during the period February 20, 1978 and January 1, 1979" and alleges that its rules for the 1978-79 year incorporate those of Liverpool & London.

("FAA"),[21] and recent Supreme Court decisions in support of their positions. In response, the Trust argues that fragmented foreign arbitrations will disrupt implementation of the Plan and delay the claims resolution process.

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21. The FAA provides in relevant part as follows:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate . . .
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> § 3. Stay of proceedings where issue therein referable to arbitration
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Appendix E

The relevant arbitration provisions are similar in many respects. All require that any dispute under the Club's rules be submitted to arbitration under English law.[22] With respect to at least one key issue raised in the Trust's Complaint, we

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22. Liverpool & London's rules state in pertinent part:

> If and whenever any difference or dispute between the Association and any member touching any loss, claim, or contribution, such difference or dispute shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or, if they cannot agree, to be appointed by the President for the time being of the Law Society of England. The provisions of the Arbitrations Acts for the time being in force shall apply to any such arbitration. . . .
>
> No member shall be entitled to maintain any action or other proceedings against the Association in respect of any loss or claim unless and until the claim shall have been submitted to the Directors, and they shall have given their decision thereon, or shall have made default for one month in so doing, and if such decision be disputed or such default be made unless and until the claim shall have been referred to arbitration in [the] manner herein provided, and the arbitrator shall have made his award thereon, and then only for the sum so ascertained to be payable by the Association.

Motion of Liverpool & London to Dismiss or Stay, ¶ 11a, Ex. A (rules 88, 89). Skuld uses the same contractual language. For other relevant arbitration clauses, see West of England Notice of Motion, Ex. C; and UK Club Motion for Summary Judgment, Hamilton Aff. ¶ 5(c), Ex. 1 & 2. Some of the policies also contain a New York suable clause.

note that English law differs substantially from precedent in this Circuit. Compare Firma C-Trade S.A. v. Newcastle Protection and Indemnity Assoc., 2 ALL E.R. 705 (1990) (holding that insolvent shipowner could not recover under P&I policies) with Liman v. American S.S. Owners Mut. Protection and Indem. Assoc., 299 F. Supp. 106 (S.D.N.Y.), aff'd, 417 F.2d 627 (2d Cir. 1969), cert. denied, 397 U.S. 936, 90 S. Ct. 946, 25 L. Ed. 2d 116 (1970) (permitted insolvent shipowner to borrow funds necessary to satisfy policy's pay first provision).

The FAA provides that written arbitration agreements, like any contract, are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA establishes a federal policy favoring rigorous enforcement of arbitration agreements, "absent a countervailing policy manifested in another federal statute." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221, 105 S. Ct. 1238, 1243, 84 L. Ed. 2d 158 (1985). "The party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of the other statute." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483, 109 S. Ct. 1917, 1921, 104 L. Ed. 2d 526 (1989), citing, Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226-227, 107 S. Ct. 2332, 2337-2338, 96 L. Ed. 2d 185 (1987).

Under the standards promulgated in Rodriguez and McMahon, the Trust bears the burden of showing that the

relevant arbitration provisions are unenforceable either as a matter of contract law or as matter of Congressional policy. In an attempt to meet its burden, the Trust asserts that piecemeal arbitration would nullify certain fundamental policies expressed in the Bankruptcy Code and that we should therefore exercise our discretion to maintain jurisdiction over the Complaint. The Clubs argue, inter alia, that the FAA has particular force and weight in international commercial disputes and that we should uphold the arbitration agreements to preserve confidence in commercial agreements abroad. We discuss the arguments of the parties in more detail below.

Numerous courts have found that the FAA irreconcilably conflicts with the Bankruptcy Code. For example, in Zimmerman v. Continental Airlines, Inc., 712 F.2d 55, 59 (3d Cir. 1983), cert. denied, 464 U.S. 1038, 104 S. Ct. 699, 79 L. Ed. 2d 165 (1984), the Third Circuit held that "the intentions of Congress will be better realized if the Bankruptcy Reform Act is read to impliedly modify the [FAA]." Accord, In re Chas. P. Young Co., 111 Bankr. 410, 416-418 (Bankr. S.D.N.Y. 1990); In re Springer-Penguin, Inc., 74 Bankr. 879, 884 (Bankr. S.D.N.Y. 1987). Citing the broad jurisdictional grant in the Bankruptcy Reform Act of 1978, Zimmerman held that "the power to stay bankruptcy proceedings pending arbitration . . . is left to the sound discretion of the bankruptcy court." Zimmerman, supra, 712 F.2d at 59-60. See Bousa Inc. v. Oy (In re Bousa Inc.), 1993 U.S. Dist. LEXIS 3221, 1993 WL 78019, *2 (S.D.N.Y. 1993) (bankruptcy court has discretion to deny arbitration); In re Chas. P. Young Co., supra, 111 Bankr. at 417 ("It is within the discretion of the bankruptcy court judge to decide whether or not to compel a debtor to proceed with arbitration

proceedings."); In re Al-Cam Dev. Corp., 99 Bankr. 573, 578 (Bankr. S.D.N.Y. 1989) (bankruptcy court may exercise discretion to deny enforcement of arbitration clause).

Zimmerman's application in noncore cases, however, has been limited by recent decisions in both the Third Circuit and our own. For example, following Rodriguez, supra, and McMahon, supra, the Third Circuit retreated from its holding in Zimmerman and held that where an adversary proceeding is not core, a district court is without discretion to deny enforcement of an arbitration agreement when the party opposing arbitration has not shown that the text, legislative history, or purpose of the Bankruptcy Code conflicts with arbitration. Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1157-1161 (3d Cir. 1989). With few exceptions, bankruptcy courts in the Second Circuit have followed the Hays decision in noncore proceedings. Non-Ferrous Metals (U.S.A.), Inc. v. Vantage Steel Corp. (In re Vantage Steel Corp.), 125 Bankr. 880, 886 (Bankr. S.D.N.Y. 1990); In re Drexel Burnham Lambert Group, Inc., 113 Bankr. 830, 838 n.8 (Bankr. S.D.N.Y. 1990). See generally Neufeld, Enforcement of Contractual Arbitration Agreements under the Bankruptcy Code, 65 Am. Bankr. L.J. 525 (1991).

Hays does not hold similar sway in core proceedings. Several courts have held that upon a showing that arbitration would disrupt the many policies expressed in the Bankruptcy Code, a bankruptcy judge may exercise his or her sound discretion to determine whether arbitration agreements should be enforced in core proceedings. See, e.g., In re Chorus Data Systems, Inc., 122 Bankr. 845, 851 n.6 (Bankr. D.N.H. 1990)

(noting that Hays applies only to noncore proceedings); In re FRG, 115 Bankr. 72, 75 (E.D. Pa. 1990) (advocating case-by-case balancing of hardships in core proceedings). See also American Freight Sys., Inc. v. Consumer Prods. Assocs. (In re American Freight Sys., Inc.), 164 Bankr. 341, 347 (D. Kan. 1994) (agreeing with FRG); After Six, Inc. v. Corestates Bank, N.A. (In re After Six, Inc.), 1993 Bankr. LEXIS 831, *8, 1993 WL 224737 at *3 (Bankr. E.D. Pa. 1993), aff'd sub nom. After Six, Inc. v. Abraham Zion Corp., 167 Bankr. 35, 1994 WL 125219 (E.D. Pa. 1994) (holding deferral to arbitration within court's discretion in core and noncore proceedings).

We have already held that this adversary proceeding is core under 28 U.S.C. § 157(b)(2)(A) & (O) and therefore distinguishable from Hays on its face. In light of the above decisions, we hold that a bankruptcy judge may exercise his or her discretion in core proceedings if the standards articulated in McMahon, supra, 482 U.S. at 226-227, 107 S. Ct. at 2337-2338, are satisfied. Thus, a party contesting arbitration must show either (1) that the arbitration clause is unenforceable as a matter of contract law or (2) that Congress, in enacting the Bankruptcy Code, intended to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies would inherently conflict with the underlying purposes of the Code.

The Trust does not contest the general contractual validity of the arbitration agreements. Instead, the Trust argues that following factors weigh against compelling arbitration: (1) the P&I policies are critical to the administration of the Debtors' Plan and Trust; (2) the Complaint alleges

wrongdoing that makes it anything but a "garden-variety" contract dispute; (3) the vast number of asbestos-related claims requires centralized case management; and (4) fragmented arbitrations would undermine the Debtors' confirmed Plan. Trust Brief at 78-79. The Trust also cites numerous Code sections that support its general policy argument that arbitration would disrupt implementation of the plan. See, e.g., 11 U.S.C. §§ 1123(a)(5) and 1142(a) (defining court's power to implement plan); Trust's Brief at 21-28, 78-81.

The Clubs emphasize the international character of the agreements in their motion to compel arbitration. For example, the UK Club argues that strict adherence to the FAA will foster confidence in the international commercial system. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (concluding that the needs of the foreign commercial system require enforcement of the parties' agreement, notwithstanding a contrary result under domestic law) (citation omitted). The Clubs also cite bankruptcy court authority upholding foreign arbitration agreements. See, e.g., Unsecured Creditors' Committee of Dollar Corp. v. Hyundai Motor Co. (In re Dollar Corp.), 139 Bankr. 192, 193 (Bankr. E.D. Mich. 1992) (finding no conflict between FAA and Bankruptcy Code when liquidated debtor is party to foreign arbitration agreement).

We agree with the Clubs that Rodriguez, McMahon, and Mitsubishi add renewed vigor to the FAA and that some decisions have limited judicial discretion to invalidate otherwise enforceable arbitration agreements in bankruptcy

cases. The vast majority of these cases, however, do not involve core proceedings where fundamental bankruptcy principles are at issue.

We find the Trust's arguments more compelling. The power to appoint a trustee for the purpose of collecting property of the debtor to satisfy a class of claims is essential to a bankruptcy court's ability to implement a plan of reorganization. In re Johns-Manville Corp., 97 Bankr. 174, 180 (Bankr. S.D.N.Y. 1989); see 11 U.S.C. § 1142(b) ("The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.") See also Fed. R. Bankr. P. 3020(d) ("Notwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate.") Clearly, the Clubs' alleged refusal to honor prepetition insurance policies endangers the Debtors' ability to resolve, by way of the Trust, the vast number of personal injury claims filed against it because, as we have said before, the P&I policies are the Trust's primary asset. Without the Clubs' good faith participation, Debtors will be unable to implement the Plan's procedures designed to allocate portions of the Debtor's property to individual claimants. Moreover, arbitration of the disputes raised in the Complaint would prejudice the Trust's efforts to preserve the Trust as a means to compensate claimants. We will therefore exercise our discretion and deny arbitration.

Appendix E

VI. Adequacy of Pleadings

We next address the Clubs' motions to dismiss certain portions of the Complaint alleging common law fraud, conspiracy, and violations of New York Insurance Law § 2601 and New York General Business Law § 349.

Fed. R. Civ. Pro. 9(b) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." To satisfy the pleading requirement in Rule 9(b), the time, place, and nature of the misrepresentation must be set forth so that the defendant's intent to defraud is evident in the complaint. Ross v. Bolton, 904 F.2d 819, 823 (2d Cir. 1990). The complaint should, nevertheless, be read generously in light of Fed. R. Civ. P. 8(a) which requires plaintiffs to plead only a short, plain statement of the grounds upon which they are entitled to relief. Ross v. A.H. Robins Co., 607 F.2d 545, 557 n.20 (2d Cir. 1979), cert. denied, 446 U.S. 946, 100 S. Ct. 2175, 64 L. Ed. 2d 802 (1980).

The Trust alleges that the Clubs, both individually and in concert, fraudulently refused to adjust, settle, and pay asbestos-related claims filed against the Debtors and the Trust. Complaint at ¶¶ 92, 93. The Trust also alleges that the Clubs misrepresented the scope and coverage of the P&I policies and that the Clubs have conspired to undermine the Trust's ability to fulfill its obligations under the Plan. Id. at ¶ 93.

Despite the liberal pleading rules cited above, a plaintiff must plead specific facts that, when read in their entirety, satisfy

the elements of common law fraud. See, e.g., Luce v. Edelstein, 802 F.2d 49, 54 (2d Cir. 1986) (fraud allegations must specify the time, place, speaker and content of the misrepresentation) (citations omitted); Pereira v. Centel Corp. (In re Argo Communications Corp.), 134 Bankr. 776, 791-793 (Bankr. S.D.N.Y. 1991) (listing elements of common law fraud and discussing general pleading requirements). The Complaint fails to meet these minimal standards, in large part, we believe, because the Trust uses the word "fraudulently" in general terms to describe what is alleged to be the Clubs' wrongful refusal to adjust and settle asbestos-related claims. See Complaint at ¶ 93. Nevertheless, the Complaint lacks the factual support and specificity to satisfy Rule 9(b). Moreover, the Complaint fails to disclose the nature of each Club's participation in the alleged fraud. DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987) ("where multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his [or her] participation in the fraud.") The Trust may, of course, amend the Complaint to correct its insufficiencies.

The Clubs also move to dismiss the Trust's claim under New York Insurance Law § 2601 because the Trust fails to allege facts showing malice or criminal indifference. Moreover, the Clubs argue that there is no private cause of action under § 2601. In the Complaint the Trust alleges that the Clubs customarily adjust and settle garden-variety personal injury claims while refusing to settle asbestos-related claims. Complaint at ¶¶ 86-91.

Appendix E

New York Insurance Law § 2601 provides that "no insurer doing business in [New York] shall engage in unfair claim settlement practices." N.Y. Insurance Law § 2601 (McKinney Supp. 1994). Unfair business practices, by definition, must be committed "without just cause" and "with such frequency as to indicate a general business practice[.]" Id. Acknowledging a split among the lower courts, the New York Court of Appeals has recently held that New York law does not currently recognize a private cause of action under § 2601. Rocanova v. Equitable Life Assurance Soc'y of the United States, 81 N.Y.2d 1007, 616 N.E.2d 161, __, 1994 WL 174767 at *3, 599 N.Y.S.2d 806 (N.Y. May 10, 1994) (citations omitted).[23] The Trust's reference to § 2601 is therefore dismissed.

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23. We note that the Second Circuit reached a different conclusion in Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d 47 (2d Cir. 1992), certified questions withdrawn, 984 F.2d 69 (2d Cir. 1993). Riordan was decided before the New York Court of Appeals resolved the issue of private rights of action under § 2601. See Rocanova, supra. In applying New York law, we adhere to the following guidelines voiced by the Supreme Court:

> The State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782, 18 L. Ed. 2d 886 (1967), quoting Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956).

The Clubs also object to the Trust's claim under New York General Business Law § 349(a). The Clubs argue that § 349 is a consumer fraud protection statute inapplicable to disputes among sophisticated corporate entities. We disagree.

Section 349(a) provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." New York General Business Law § 349(a) (McKinney Supp. 1994). The statute is enforceable by both the attorney general and any person injured by a deceptive act committed by a business. Id. at §§ 349(b), 349(h). The statute contains no exceptions and no exemptions applicable to other regulated industries. The Second Circuit has held that § 349 applies to every business operating in New York, including insurance companies. Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d 47, 52 (2d Cir. 1992).

We find little merit in the Clubs' assertion that a corporate entity cannot assert a claim under § 349. Rather, most courts have held that § 349 applies when one business sues another business if the plaintiff-business acted as a consumer of the defendant-business's products or services. See, e.g., Schroders, Inc. v. Hogan Sys., Inc., 137 Misc. 2d 738, 742, 522 N.Y.S.2d 404, 406 (N.Y. Sup. Ct. 1987) (holding that corporate consumer has standing to assert a claim under § 349); Sulner v. General Accident Fire and Life Assurance. Corp., Ltd., 122 Misc. 2d 597, 599-600, 471 N.Y.S.2d 794, 796-797 (N.Y. Sup. Ct. 1984) (holding that § 349(h) allows businesses to bring actions against other businesses) (citations omitted). See also Official Supplementary Practice Commentaries to General Business Law §§ 349-350,

reprinted at 19 McKinney § 349, 131 (McKinney Supp. 1994). As a consumer of marine insurance, the Trust in entitled to invoke the protections and remedies provided in § 349. We therefore hold that the broad remedial nature of § 349 encompasses an action by a business consumer of insurance, even when that consumer is a corporation of obvious sophistication.[24] Lastly, several Clubs move to dismiss counts 9 (punitive damages) and 10 (attorneys' fees) of the Complaint on the grounds that both counts fail to allege separate causes of action under New York law. The Clubs also argue that punitive damages are inappropriate in maritime proceedings involving alleged breach of contract. We review both state and federal law to arrive at the conclusion below.

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24. A case cited by the Clubs, Genesco Entertainment, A Div. of Lymutt Indus., Inc. v. Koch, 593 F. Supp. 743 (S.D.N.Y. 1984), does not refute our holding. In Genesco, the district court stated that § 349 does not apply to "[a] breach of a private contract affecting no one but the parties to the contract, whether that breach be negligent or intentional, [because the conduct] is not an act or practice affecting the public interest." Id., 593 F. Supp. at 751-752. We find it obvious that a nexus exists between the Trust and the public interest. As we stated earlier, the Trust was created to collect funds owed under the Debtors' insurance policies for ultimate distribution to thousands of asbestos-related personal injury claimants. According to the Complaint, many of the claimants endure serious physical illnesses and require costly medical care. Many others have died. The public certainly has an interest in seeing that those who have contracted and accepted payment to ensure against such losses should also bear the resulting financial burden of coverage if appropriate.

Appendix E

New York does not recognize a separate cause of action for punitive damages. Lovebright Diamond Co., Inc. v. Spragins, 574 F. Supp. 76, 80 (S.D.N.Y. 1983); In re Argo Communications, supra, 134 Bankr. at 796; Green v. Fischbein Olivieri Rozenhold & Badillo, 119 A.D.2d 345, 507 N.Y.S.2d 148, 153 (1st Dep't 1986). Nonetheless, we need not dismiss a claim alleging punitive damages because "such a claim constitutes merely an element of the total damages claimed on the underlying cause of action." Green, supra, 507 N.Y.S.2d at 153; Argo, supra, 134 Bankr. at 796-7 (citations omitted). If the Trust proves at trial that the Clubs acted with moral turpitude demonstrative of a pattern of wanton dishonesty toward the public as a whole, then punitive damages may be warranted.

The Clubs' second objection necessitates a lengthier analysis. Federal choice of law rules applicable in admiralty cases provide that in the absence of an established federal maritime rule, state law governs the interpretation and construction of maritime insurance contracts. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 313, 75 S. Ct. 368, 370, 99 L. Ed. 337 (1955); State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld, 921 F.2d 409, 414 (2d Cir. 1990). As we stated in In re Prudential Lines, Inc., supra, 148 Bankr. at 738, P&I policies are maritime contracts.

The terms and conditions of P&I policies do not provide for the allowance or disallowance of punitive damages. Under Wilburn Boat, supra, we must determine whether federal law allows the award of punitive damages under facts similar to those alleged in the Complaint and, to the extent that state and federal common law may differ, which law prevails.

Appendix E

Under federal common law, punitive damage awards are generally improper in a maritime breach of contract action unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d Cir. 1985) (citing Restatement (Second) of Contracts § 355 (1979)); See G.D. Searle & Co. v. Medicore Communications, Inc., 843 F. Supp. 895, 913 (S.D.N.Y. 1994) (applying same rule in nonmaritime context).

Notwithstanding this general prohibition, the Second Circuit has noted a number of exceptions to the rule, including actions based on the bad faith refusal of an insurer to settle an insurance claim for which it is liable. Thyssen, supra, 777 F.2d at 63 (citations omitted). While there appear to be no maritime cases discussing punitive damages in breach of contract actions, federal courts have held that punitive damages are available in nonmaritime breach of contract actions involving an insurer's bad faith or outrageous conduct. Id. at 62 n.5 (noting "new body of case law" awarding punitive damages against insurance companies on the basis of outrageous conduct in the handling of claims) (citations omitted). We see no reason why a similarly strict standard should not govern maritime cases.

Fortunately, we need not decide whether state or federal law sustains an award of punitive damages because both sovereigns apply a similar standard.[25] New York law, much

25. Although neither the Trust nor the Clubs specifically address the choice of law issue, we assume that New York law applies in the absence of controlling federal law. See, e.g., State

(Cont'd)

like the federal rule announced in Thyssen, supra, 777 F.2d at 63, dictates a strict standard for the issuance of punitive damages. See, e.g., Walker v. Sheldon, 10 N.Y.2d 401, 405, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 491 (1961) (holding that only gross and wanton conduct against the public can support an award of punitive damages.) In breach of contract actions, punitive damages are recoverable in New York as long as the underlying tort evinces a high degree of moral turpitude that demonstrates a pattern of wanton dishonesty toward the public as a whole. Rocanova, supra, 1994 WL 174767 at *2 (citations omitted).

In a nutshell, the Trust alleges that the Clubs have participated in a global conspiracy to deny coverage to shipowners whose employees claim asbestos-related injuries. From our reading of the alleged facts, we conclude that the Trust alleges facts of outrageous conduct and conspiracy that, if proven at trial, could support the award of punitive damages.

The Complaint also alleges facts that, at a minimum, state a claim for tortious bad faith by an insurer. See, e.g., Pavia v. State Farm Mut. Automobile Ins. Co., 82 N.Y.2d 445, 626 N.E.2d 24, 605 N.Y.S.2d 208 (1993) (describing prima facie case of bad faith against insurer). In New York, "a bad-faith

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(Cont'd)

Trading Corp. of India, Ltd., supra, 921 F.2d at 414 & 416-17 (stating choice of law standards) (citations omitted). The Clubs argue that federal maritime law preempts state law to the extent that federal rules exist--a statement with which we agree. The Clubs do not assert, however, which state's laws would apply in the absence of a federal rule.

plaintiff must establish that the defendant insurer's conduct constituted a gross disregard of the insured's interests when considering a settlement offer." Id., 82 N.Y.2d at 453, 626 N.E.2d at 27, 605 N.Y.S.2d at 211 (quotation and citation omitted). The Trust asserts that the Clubs willfully conspired to avoid satisfying their contractual obligations to settle and adjust claims and that the Clubs routinely treat asbestos-related claims differently from other personal injury claims. See, e.g., Complaint ¶¶ 92, 93 ("The Clubs have acted, both individually and in concert, to wrongfully refuse to adjust, settle and pay for any and all asbestos-related claims made against the Trust or the debtor.") Assuming as we must that uncontroverted facts alleged in the Complaint are true, it is at least possible that a reasonable fact finder could conclude that the Clubs' actions amount to bad faith or even outrageous conduct. Material facts, of course, remain in dispute.[26]

In light of the above, the Trust's Complaint is deemed to demand punitive damages if evidence at trial supports an award. The Clubs' motion to dismiss Count 9 of the Complaint is denied as a matter of law.

We also deny the Clubs' motion to dismiss Count 10. State law creates the substantive right to attorney's fees. Chambers v. NASCO, Inc., 501 U.S. 32, __, 111 S. Ct. 2123, 2136-2137, 115 L. Ed. 2d 27 (1991); Riordan v. Nationwide Mut. Fire Ins. Co., supra, 977 F.2d at 53. In New York,

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26. For example, the UK Club states that is has consistently negotiated settlements in good faith with the Trustee. Hamilton Aff., ¶ 4, sworn April 7, 1994.

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> the law is well settled that in the absence of a statute expressly authorizing [him or her] to do so, or unless the parties have otherwise agreed or stipulated, a civil litigant may neither sue [his or her] adversary to recover fees paid to [his or her] attorney for legal services, nor, unless the court has directed taxation of such a payment in extraordinary circumstances, tax them as a disbursement.

Donn v. Sowers, 103 A.D.2d 734, 735, 477 N.Y.S.2d 197, 198 (2d Dep't 1984) (citation omitted); see also, Fresh Meadows Medical Assoc. v. Liberty Mut. Ins. Co., 65 A.D.2d 431, 434, 411 N.Y.S.2d 655, 657 (2d Dep't 1978), rev'd on other grounds, 49 N.Y.2d 93, 400 N.E.2d 303, 424 N.Y.S.2d 361 (1979) ("A litigant has no inherent right to have his [or her] attorney's fees paid by his [or her] opponent . . . except if specifically provided by contract or statute.") (citations omitted).

Count 10 explicitly falls within the contractual exception to the general rule barring attorney's fees as a separate cause of action. The Trust alleges that the relevant P&I policies provide for attorneys fees as part of the "costs, charges and expenses reasonably incurred and paid by the assured in connection with any liability insured under this policy," subject to applicable deductibles. See Complaint, ¶ 98 (quoting P&I policy). Count 10 therefore states a claim for attorney's fees recognized under New York law. Whether another construction of the above contractual terms may be appropriate under the circumstances will be resolved at trial.

Appendix E

VII. Intervenors' Complaint

The Clubs also move to dismiss the Claimants' Complaint on the grounds that the Claimants, as intervenors, lack standing under New York's direct action statute.[27] We disagree.

Fed. R. Civ. P. 24 provides for both mandatory and permissive intervention. Rule 24 provides in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its

27. The Clubs' other objections to the Intervenors' complaint have been considered elsewhere in our discussions relative to the Trust. Except as noted, the causes of action in the Intervenors' complaint are subject to the same infirmities and strengths applicable to the causes of action alleged in the Trust's Complaint. A settled order should cover both complaints.

> discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

By order dated April 6, 1993, Bankruptcy Judge Blackshear granted the Claimants' motion to intervene without indicating whether the intervention was "of right" or "permissive." Seizing upon this perceived ambiguity, the Clubs maintain that the Claimants are, at best, permissive intervenors who cannot participate absent independent grounds for federal jurisdiction. The Clubs also contend that the Claimants lack standing to sue under New York Insurance Law §§ 3420(i), 2117(b)(3)(B) and 1113(a)(21), all of which purportedly bar direct actions against marine P&I clubs. We reject both contentions.

At a minimum, Bankruptcy Judge Blackshear found that the nature and extent of the Claimants' interests warranted permissive intervention under Rule 24(b). See, e.g., United States Postal Serv. v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978) ("Permissive intervention is wholly discretionary with the trial court.") Whether Bankruptcy Judge Blackshear could have found intervention "of right" requires a lengthier review.

Rule 24(a)(2) gives any applicant a right to intervene if (1) the applicant establishes a sufficient interest in the proceedings and (2) that interest is not "adequately represented by existing parties." See 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1901 et seq. (1986 & Supp. 1994).

The Clubs do not contend that the Claimants' interests in this proceeding are insufficient or insignificant.[28] Instead, the Clubs argue that the Claimants' interests are adequately represented by the Trust.

Although counsel for the Trust is certainly competent and diligent in representing the Trust, it cannot be said that the Trust and the Claimants share identical incentives. For example, in its answer to the Intervenors' Complaint, the Trust requests that the Claimants provide certain information verifying individual injuries. The Claimants may, given the dynamics of this mass toxic tort setting, advocate less stringent factual burdens and verification procedures to lower costs and maximize distributions. Moreover, we have no doubt that the Claimants, as intervenors, will assist in the full development of the underlying factual issues raised by the Trust, as well as contribute to the just and equitable adjudication of this proceeding.

The Clubs' standing argument also fails.[29] The reasons for our denial rest in both state and federal law.

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28. The Claimants' interest in this proceeding is, indeed, obvious. The subjects of the Trust's Complaint are the Debtors' prepetition P&I policies. These policies constitute the sole property of the Trust, which in turn constitutes the major source of any distribution for the Claimants.

29. "The question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.' " Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 151, 90 S. Ct.

(Cont'd)

Appendix E

Federal admiralty law neither authorizes nor forecloses a third party's right to sue an insurance company directly. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955); State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld, 921 F.2d 409, 414 (2d Cir. 1990). Assuming that New York provides the appropriate law, see note 19, supra, the Clubs assert that New York Insurance Law § 3420 prohibits the Claimants from commencing a direct action against them and that the Claimants' complaint fails to state an independent cause of action under applicable state law.

New York Insurance Law § 3420 permits an insured's judgment creditors, i.e., third party claimants, to bring suit against the insured's liability insurer directly.

> Any person who, or the personal representative of any person who, has obtained a judgment against the insured or his personal representative, for damages for injury sustained or loss or damage occasioned during the life of the policy or contract[.]

N.Y. Ins. Law § 3420(b)(1) (McKinney Supp. 1994). This section generally applies to insurance policies that underwrite

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827, 828, 25 L. Ed. 2d 184 (1970); see also Sierra Club v. Morton, 405 U.S. 727, 732, 92 S. Ct. 1361, 1364-1365, 31 L. Ed. 2d 636 (1972) ("standing depends on whether the party has alleged such a 'personal stake in the outcome of the controversy' as to ensure that the 'dispute sought to be adjudicated will be presented in an adversarial context. . . .' ") (citations omitted).

"liability for injury to person." N.Y. Ins. Law § 3420(a) (McKinney Supp. 1994). Several exceptions, however, disallow certain direct actions by third parties.

One exception to § 3420 is relevant here. Citing other sections of the New York Insurance Law, courts have generally held that third parties cannot bring direct actions against maritime insurers. See N.Y. Ins. Law §§ 2117(b)(3), 3420(i) (McKinney Supp. 1994) (exempting marine insurers from state licensing requirements); Ahmed v. American S.S. Owners Mut. Protection & Indem. Ass'n, Inc., 444 F. Supp. 569 (N.D. Cal. 1978), aff'd, 640 F.2d 993 (9th Cir. 1981) (holding P&I policies are excluded from New York's direct action statute), accord, Miller v. American S.S. Owners Mut. Protection & Indem. Co., 509 F. Supp. 1047 (S.D.N.Y. 1981); Cowan v. Continental Ins. Co., 86 A.D.2d 646, 446 N.Y.S.2d 412 (2d Dep't 1982). Citing these authorities and others, the Clubs argue that the Claimants have no cause of action under New York law and therefore no standing to intervene in this proceeding.

An abundance of case law, however, refutes the Clubs' position. Under Fed. R. Civ. P. 24(a), an intervenor "of right" does not need the standing necessary to commence a suit so long as an actual case or controversy exists between the initial, ongoing litigants. United States Postal Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978), citing, e.g., Trbovich v. United Mine Workers of Am., 404 U.S. 528, 536-539, 92 S. Ct. 630, 635-636, 30 L. Ed. 2d 686 (1972); see Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 n.18, 98 S. Ct. 2396, 2404 n.18, 57 L. Ed. 2d 274 (1978) (finding that court possessed ancillary jurisdiction to

entertain intervenor's claim despite absence of subject matter jurisdiction); 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1917 (1986 & Supp. 1994) (stating as general rule that intervenors of right need not have independent jurisdiction.) but see Diamond v. Charles, 476 U.S. 54, 68, 106 S. Ct. 1697, 1706, 90 L. Ed. 2d 48 (1986) (noting that Supreme Court has not determined whether a party seeking to intervene under Rule 24(a)(2) must also meet the requirements of Article III standing).

In our discussion above, we held that a sufficient case or controversy exists to support consideration of the Trust's declaratory judgment action. See Discussion, I, supra. As intervenors of right, the Claimants may stand on the Trust's broad shoulders for purposes of this core proceeding--notwithstanding their alleged lack of standing under § 3420. The Clubs' invitation to dismiss the intervenors' complaint for lack of independent standing will be denied.[30]

Moreover, we are disinclined to follow courts that have enforced New York's direct action statute against injured third parties in maritime cases. See, e.g., Miller, supra, 509 F. Supp. 1047 (holding New York's direct action statute inapplicable in maritime cases). A more compelling view, we believe, rests in the broad remedial purpose of the Jones Act, 46 U.S.C. § 688, a federal statute that arguably preempts New York's attempts to limit the liability of maritime insurers. See R. Alexander, Admiralty, Federalism, and the New York Direct Action Statute: Seamen's Rights to Enforce

30. We add that the Intervenors' Complaint will not be burdensome on the Clubs because the issues raised therein mirror those articulated in the Trust's Complaint.

Jones Act Judgments, 49 Brook. L. Rev. 179 (1983) (New York law barring direct actions against maritime insurers conflicts with federal admiralty power and Jones Act.) This reading, we believe, is not inconsistent with the narrow holding in Wilburn Boat, supra, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 2d 337, concerning state authority to regulate maritime insurance. See R. Alexander, supra, 49 Brook. L. Rev. at 201-206 (construing Wilburn Boat narrowly according to its facts). Although we do not hold on the issue, we note that "the judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law of maritime." McDermott, Inc. v. AmClyde, __ U.S. __, __, 114 S. Ct. 1461, 1465, 128 L. Ed. 2d 148 (1994), quoting, United States v. Reliable Transfer Co., 421 U.S. 397, 409, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975).

As a final aside, we note that the Clubs generally raised thought-provoking arguments supporting dismissal of the Complaint. The arguments were sometimes poor or simply undeveloped, however, thereby requiring us to engage in extensive independent research that substantially delayed issuance of this decision. Further complicating our decision-making role, precious few of the parties' briefs included tables of contents and lists of authorities--small inconveniences that become significant in a ten-party, multi-count, dispute. Given what we have witnessed, we can only speculate that the parties, either all or some, see little benefit in a speedy resolution of the issues presented. We will not allow this proceeding to advance at a snail's pace in the future.

Appendix E

VIII. Conclusions

1. The Trust's declaratory judgment action raises justiciable issues. Summary judgment for the Clubs will be denied.

2. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) & (O). The Clubs' motions for abstention will be denied.

3. Injury-in-fact during the policy term triggers insurance coverage. Summary judgment will be granted sua sponte.

4. We may exercise our discretion to deny arbitration in core proceedings. Summary judgment for the Clubs will be denied.

5. The Complaint fails to allege common law fraud with sufficient particularity. The fraud allegation will be dismissed with leave to replead.

6. There is no private right of action under New York Insurance Law § 2601. This count will be dismissed.

7. The Complaint states a claim under New York General Business Law § 349. The Clubs motions for dismissal and summary judgment will be denied.

8. The Complaint states a claim for punitive damages. The Clubs' motions for dismissal or summary judgment will be denied.

9. The Complaint states a claim for attorney's fees. The Clubs' motions for dismissal or summary judgment will be denied.

10. As intervenors of right, the Claimants need not assert independent standing to join this core proceeding. The Clubs' motion to dismiss the Claimants' Complaint will be denied.

DATED at New York, New York this 1st day of July, 1994.

Francis G. Conrad*

United States Bankruptcy Judge

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* sitting by special designation.

APPENDIX F — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Art. I, § 8

Section 8. [1] The Congress shall have Power . . .

* * *

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

* * *

U.S. Const., Art. III, §§ 1 and 2

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—

to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

U.S. Const., Art. VI

* * *

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

9 U.S.C. § 2

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the

whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * *

9 U.S.C. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

* * *

Appendix F

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notiee and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. . . .

* * *

Appendix F

9 U.S.C. § 201

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

* * *

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof,

any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect to which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

* * *

Appendix F

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

* * *

Convention on the Recognition and Enforement of Foreign Arbitral Awards. Done at New York June 10, 1958; entered into force for the United States December 29, 1970, subject to declarations.

Implementing Legislation Pub.L. 91-368, 84 Stat. 692, 9 USC 201-208

* * *

9 U.S.C. § 202

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other

reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

* * *

9 U.S.C. § 203

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

* * *

9 U.S.C. § 206

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 693.)

* * *

Appendix F

28 U.S.C. § 157.

Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

* * *

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings, and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

* * *

28 U.S.C. § 1334(b)

§ 1334. Bankruptcy cases and proceedings

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

* * * *

(2)

Supreme Court, U.S.
FILED

No. 99-1273

IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., WEST OF ENGLAND SHIPOWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), CONTINENTAL INSURANCE COMPANY, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON MUTUAL STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, AND MARINE OFFICE OF AMERICA CORP.,

Petitioners,

v.

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.), INC. REORGANIZATION TRUST AND ASBESTOS CLAIMANTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS FULTON SYNDICATE SURVIVORS AND THE TRAVELERS INDEMNITY COMPANY IN SUPPORT OF THE PETITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are identified in the Petition for Certiorari (the "Petition"). This filing is submitted by the Fulton Syndicate Survivors and The Travelers Indemnity Company as respondents who support the Petition. The Fulton Syndicate Survivors are five former members of the Protection and Indemnity Insurance Underwriting Syndicate, New York, who were incorrectly sued in this action as Marine Officers of America Corp. By Stipulation dated March 16, 1993, Marine Officers of America Corp. was dismissed, and the Fulton Syndicate Survivors were substituted. The Travelers Indemnity Company was incorrectly sued in this action as The Travelers Insurance Company and has appeared under its correct name. Each of the Fulton Syndicate Survivors makes its disclosure pursuant to Supreme Court Rule 29.6 as follows:

The Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company, and its affiliates are subsidiaries of Travelers Property Casualty Corp., a portion of the stock which is publicly held, which is controlled by Citigroup, Inc., a publicly held company.

ACE Property and Casualty Company, formerly known as CIGNA Property and Casualty Company, formerly known as Aetna Insurance Company, is a publicly traded holding company.

The Great American Insurance Company is a subsidiary of American Financial Group, Inc., a publicly traded company.

The Hartford Insurance Group companies are subsidiaries of The Hartford Financial Services Group, Inc., a publicly held company.

The obligations of United States Fire Insurance Company arising from its participation in The Protection and Indemnity Underwriting Syndicate, New York, were passed to Marine Office of America Corporation (more commonly referred to as "MOAC" and misidentified by Respondents as Marine Officers of America Corp.), a subsidiary of The Continental Insurance Company which during the pendency of this action was purchased by CNA. CNA therefore responds for the obligations of United States Fire Insurance Company. The direct or indirect parent company of all the CNA companies is CNA Financial Corporation, a publicly traded holding company.

The Travelers Indemnity Company and its affiliates are subsidiaries of Travelers Property Casualty Corp., a portion of the stock which is publicly held, which is controlled by Citigroup, Inc., a publicly held company.

TABLE OF CONTENTS

	Page
Parties to the Proceeding and Statement Pursuant to Rule 29.6	i
Table of Contents	iii
Table of Cited Authorities	iv
Preliminary Statement	1
Statement of the Case	2
Reasons for Granting the Writ	4
I. The Second Circuit's Opinion Gravely Departs From This Court's Teaching.	4
II. The Second Circuit Opinion Creates A Direct Conflict With The Majority Of Other Appellate Courts, Particularly The Seventh Circuit.	11
III. The Second Circuit's Decision Will Cause Havoc In The Bankruptcy Courts.	14
Conclusion	16

TABLE OF CITED AUTHORITIES

Page

Cases:

In re Ramex Int'l, Inc., 91 B.R. 313 (E.D. Pa. 1988) 13

In re R.I. Lithograph Corp., 60 B.R. 199 (D.R.I. 1986) 13

In re U.S. Brass Corp., 110 F.3d 1261 (7th Cir. 1997) 2, 11, 12, 13

Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) ..... *passim*

Pozzi v. Merchants and Business Men's Mutual Ins. Co., 1992 WL 122904 (E.D. Pa. June 2, 1992) 13

Statutes:

28 U.S.C. § 157 15

28 U.S.C. § 157(b)(1) 4

28 U.S.C. § 157(c)(1) 4

Cited Authorities

Page

United States Constitution:

Article III 1, 4, 5, 6, 14

Rule:

Supreme Court Rule 12.6 2

PRELIMINARY STATEMENT

This case is about whether the contours of federal jurisdiction may be impermissibly stretched to allow non-Article III judges to render final judgments on independent state-law contract claims in a bankruptcy proceeding. This Court has already emphatically stated that the answer is no, holding that the Constitution expressly protects litigants from such extra-judicial exercises of power. *See Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). Courts across the country have faithfully followed this edict in determining the bankruptcy courts' legitimate jurisdiction. In the decision below, the Second Circuit gravely departed from this Court's teaching and unconstitutionally conferred upon non-Article III bankruptcy judges the power to adjudicate as a "core proceeding" a traditional contract action regarding insurance rights that arises exclusively under state law.

While this case is cloaked in what may appear to be the technical trappings of bankruptcy procedure and insurance contracts, it raises fundamental questions of federal jurisdiction. For example, when should a traditionally common law claim involving breach of contract be finally decided as part of a statute-based bankruptcy proceeding? May a state-law claim be deemed "core" simply because its resolution would impact core bankruptcy functions? Should this Court's restrictive bankruptcy decisions be "narrowly construed" into extinction while the lower courts broadly expand bankruptcy court jurisdiction beyond constitutional limits? May litigants' rights to plenary decision-making by an Article III court and a jury trial be curtailed in the name of judicial efficiency? In holding that the bankruptcy court may exercise core jurisdiction over a debtors' alleged rights

to insurance proceeds, the Second Circuit deviated severely from this Court's decision in *Marathon*, and squarely disagreed with the Seventh Circuit's opinion in *In re U.S. Brass*, 110 F.3d 1261 (7th Cir. 1997).

Not surprisingly, the panel of the Second Circuit issuing this radical decision did not reach a consensus. The Court's opinion is authored by Judge Walker, who writes that a post-petition breach of contract claim may be "core" based on the impact the contract has on core bankruptcy functions. Judge Newman concurs in the result, but disagrees with the reasoning, and would issue an even more dramatic ruling that *every* post-petition breach of contract claim is a "core" proceeding. Judge Calabresi states that he is unsure of the correct approach for deciding when a contractual claim constitutes a "core" proceeding, but agrees that this particular breach of contract claim is "core" without further explanation. When three such esteemed jurists are so graphically at odds and uncertain over the right standard for deciding the parameters of federal jurisdiction, warning bells should sound that this Court's guidance is needed.

This Court should grant certiorari to establish the proper scope of the bankruptcy courts' jurisdiction, to harmonize a clear conflict among the lower courts, and to correct the injustice of subjecting present and future litigants to unconstitutional adjudication by a non-Article III court.

STATEMENT OF THE CASE

The Fulton Syndicate Survivors and The Travelers Indemnity Company file this brief as respondents who support the Petition pursuant to Supreme Court Rule 12.6 (the "Supporting Respondents").

Like the Petitioners, the Supporting Respondents entered into marine protection and indemnity insurance contracts that allegedly provide coverage for certain asbestos-related claims asserted against the debtors (United States Lines, Inc. and United States Lines (S.A.), Inc.) and that are currently being defended by the debtors' reorganization trust. The insurance agreements were entered into prior to the debtors' petition for bankruptcy in 1986. The asbestos-related claimants do not have any judgments against or settlements with the debtors' trust. Rather, the trust seeks a declaratory judgment that the insurance contracts will provide coverage for the asbestos-related claims.

The Supporting Respondents urge this Court to grant review of the first question presented in the Petition, namely whether the bankruptcy court has jurisdiction to decide the trust's contractual claims for a declaration of insurance rights as a "core proceeding."

Because the Supporting Respondents' insurance policies do not contain arbitration clauses, we take no position with respect to the Petition's second question regarding the enforcement of arbitration agreements in the Petitioners' insurance contracts.

The Supporting Respondents otherwise adopt the Petition's recitation of the Opinions Below, the Statement of Jurisdiction, the Authorities Involved, and the Statement of the Case. *See* Petition, at 1-3. We offer the following additional points as to why certiorari should be granted on the "core proceeding" issue.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S OPINION GRAVELY DEPARTS FROM THIS COURT'S TEACHING.

Section 157 of the Bankruptcy Code defines two categories of proceedings: (a) core proceedings, which the bankruptcy court may "hear and determine" and on which the court "may enter appropriate orders and judgments," 28 U.S.C. § 157(b)(1), and (b) non-core proceedings, "otherwise related to a case under title 11," which the bankruptcy court may hear, but for which the bankruptcy court is only empowered to submit proposed findings of fact and conclusions of law to the district court for *de novo* review, 28 U.S.C. § 157(c)(1). The primary jurisdictional question before the Second Circuit was whether the trust's adversary proceeding for a declaration of insurance rights may be deemed a core proceeding.

The Second Circuit correctly acknowledged that this Court's decision in *Marathon* provides the foundational rules for analysis. *Marathon* held that the broad jurisdictional provisions of the Bankruptcy Act of 1978 violated Article III of the Constitution by granting non-Article III judges the right to determine matters traditionally delegated to Article III courts or state courts. Specifically, the Court ruled that Congress acted beyond the scope of its authority in delegating to bankruptcy courts the power to decide claims asserted by the debtor for breach of contract, breach of warranty, misrepresentation, coercion and duress.

The Court premised its ruling in part on the distinction between public rights, for which Congress may delegate jurisdiction to legislative courts, and private rights, which may not be removed from Article III jurisdiction.

> [T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern's right to recover contract damages to augment the estate is "one of private right, that is, of the liability of one individual to another under the law as defined."

458 U.S. at 71-72.

The Court also relied on the distinction between statutory rights, which Congress has the power to define, and private rights, which belong to the province of the Judiciary:

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right it has created. No comparable justification exists,

> however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

Id. at 83-84.

The central principle in the Court's opinion is that private rights may not be removed from Article III jurisdiction. Accordingly, the Court concluded that the Bankruptcy Act improperly encroached upon the judicial power by vesting bankruptcy judges with unauthorized powers over Northern's state-created right. *Id.* at 84. The touchstone of the Court's analysis was that "Northern's claim for damages for breach of contract and misrepresentation, involve[d] *a right created by state law, a right independent of and antecedent to the reorganization petition* that conferred jurisdiction upon the Bankruptcy Court." *Id.* (emphasis added).

The Second Circuit's decision rightly quotes this language as *Marathon*'s principal holding. Petition Appendix ("Pet. App.") at 8a. However, Judge Walker's decision immediately proceeds to misstate the test as follows: "under *Marathon*, whether a contract proceeding is a core proceeding depends on (1) whether the contract is antecedent to the reorganization proceeding; and (2) the degree to which *the proceeding is independent of the reorganization*." *Id.* (emphasis added). Judge Walker incorrectly shifts from

focusing on the *rights* at issue (the driving principle behind *Marathon*'s analysis) and their relationship to the reorganization petition, to focusing on the *proceeding* and its relationship to the reorganization itself. As the opinion progresses, the focus shifts even farther away. In the only three paragraphs of the opinion that analyze the status of the trust's claims, Judge Walker concludes that "the impact these contracts have on other core bankruptcy functions . . . render the proceedings core." Pet. App. 10a. Thus, the Second Circuit moves from analyzing: (a) the nature of the rights, to (b) the relationship between the proceeding and the reorganization, to (c) the impact of the contracts on other bankruptcy functions. The end result is an amorphous test that turns on whether the court believes that the claims at issue are important to the bankruptcy judge's other rulings. Of course, the outcome of such a standardless inquiry can and will vary from one court to another.

In this case, the Second Circuit concluded that the contract claims were core because the insurance agreements contain "pay-first" provisions whereby the policyholder must pay any judgment or settlement before seeking indemnification from its insurers. Because insolvent insureds have in the past tried to circumvent these provisions through "creative" payment schemes, the Second Circuit held that the bankruptcy court would need to decide whether a chosen payment plan would satisfy the insurance contracts, which could affect the court's decisions regarding priority of creditors and equitable distribution of the estate. *See* Pet. App. 12a.[1] The court's analysis is purely hypothetical:

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1. The Second Circuit also stated that the bankruptcy court would have to decide "the amounts payable under the insurance (Cont'd)

if the policyholder attempts to use a creative payment scheme, the bankruptcy may have to decide on its validity, which may affect other creditors' rights. From this string of events, the court concludes that the contracts have too significant an impact on the court's core bankruptcy functions not to be core as well.

What the Second Circuit loses sight of is that the phrase "core proceeding" is not a metaphorical term to describe "important" proceedings. *Marathon* teaches that courts may only classify proceedings as core based on an analysis of the *rights* at issue. Here, the trust is suing on contractual rights that existed before the bankruptcy proceeding and are independent of the reorganization petition. Whether the trust may recover for sums paid to asbestosis claimants under the policies is not a matter created by the bankruptcy statutes. It is a matter originating from the terms of the policies and traditionally decided under rules of contract law. If the policyholder were not insolvent, these rights would be decided in a state court under local rules of law. This is the trademark of a "private right," the adjudication of which cannot be delegated to a non-Article III judge without the parties' consent. *See Marathon*, 458 U.S. at 90 (Rehnquist, J., concurring) (debtor's suit involved "the stuff of the traditional actions at common law tried by the courts at

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(Cont'd)
contracts." Pet. App. 12a. However, the Second Circuit acknowledged in the preceding paragraph that simply augmenting the debtor's estate is not a basis for classifying a proceeding as core. Pet App. 11a ("where the insurance proceeds would only augment the assets of the estate for general distribution, the effect on the administration of the estate [is] insufficient to render the proceedings core"). Accordingly, this factor cannot support the Second Circuit's decision.

Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law.").

Not only is the Second Circuit's decision wrong, but the standard it adopts for classifying "core proceedings" is an unacceptable deviation from this Court's *Marathon* test. As stated in its opinion, the Second Circuit apparently believes it has the liberty to limit this Court's decision — even to the point of evisceration. Pet App. 7a ("We have held that 'core proceedings' should be given a broad interpretation . . . and that *Marathon* is to be construed narrowly."). Judge Newman's concurring decision takes this liberty even farther. He writes that he would issue a blanket ruling holding that all claims for breach of contract arising after the filing of the bankruptcy petition are core proceedings. The basis for his decision is judicial efficiency: "[i]n my view, the efficient functioning of the bankruptcy system will be better served by a bright-line rule that treats as core proceedings all suits alleging post-petition breaches of pre-petition contracts." Pet. App. 18a.[2] Surely, this Court's

2. Judge Newman also confuses the *Marathon* standard for determining when rights are "antecedent to the reorganization petition." Judge Newman wrongly focuses on the litigant's cause of action and argues that where a contractual breach occurs after a petition is filed, the plaintiff's asserted right is not antecedent to the petition. Pet. App. 21a. However, *Marathon* centers on the nature of the right (in this case, the right to a contractual remedy) — not the right to sue. As Judge Walker rightly states, "the critical question in determining whether a contractual dispute is core by virtue of timing is not whether the *cause of action* accrued post-petition, but whether the *contract* was formed post-petition." Pet. App. 9a. Where, as here, the debtor or its trust is seeking to enforce contractual rights that accrued pre-petition when insurance policies were issued, its claims are precisely those that *Marathon* proscribes from final adjudication in the bankruptcy courts.

instructions regarding the proper scope of federal jurisdiction should not be overridden by concerns for expediency. As this Court cogently explained in *Marathon*, litigants' rights to have their claims decided by a proper tribunal are too sacrosanct to be sacrificed on the altar of judicial efficiency.

Judge Calabresi's concurrence demonstrates the inconclusive state of law on the core proceeding issue and the problems that arise in the absence of a clear standard. Judge Calabresi identifies the large gap between Judge Newman's bright-line rule and Judge Walker's case-by-case approach, but concludes that the court need not resolve the issue. Instead, he states: "Like Judges Walker and Newman, I have no doubt that this particular post-petition breach of a pre-petition contract is core. That is all I need to decide the instant case." Pet. App. 24a. Judge Calabresi does not offer any additional explanation for his core proceeding decision, making it unclear what standard he applied to reach his conclusion.[3]

The parameters of federal jurisdiction should not be subject to the vagaries of individual judicial reactions regarding what is important to the bankruptcy court's powers, whether courts will be more efficient if they do not have to engage in an individual analysis of their jurisdictional authority, and whether a claim looks like a core proceeding. This Court's guidance is needed to establish the correct standard for classifying claims as core and the proper boundaries of the bankruptcy courts' jurisdiction.

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3. While Judge Calabresi indicates that he is more inclined to follow a case-by-case approach, he also suggests creating a middle ground, in which there would be a rebuttable presumption that all post-petition breaches of contract are core. Pet. App. 24a.

II.

THE SECOND CIRCUIT OPINION CREATES A DIRECT CONFLICT WITH THE MAJORITY OF OTHER APPELLATE COURTS, PARTICULARLY THE SEVENTH CIRCUIT.

The Supporting Respondents adopt Petitioners' argument regarding the conflict between the Second Circuit and the majority of other circuits on the core proceeding issue. *See* Petition, at 11-14. We write here separately to highlight the direct split between the Second and Seventh Circuits on the specific question of whether insurance coverage claims constitute core proceedings.

In *In re U.S. Brass Corp.*, 110 F.3d 1261 (7th Cir. 1997), Chief Judge Posner authored a unanimous opinion for the Seventh Circuit deciding a dispute strikingly similar to the instant case — in the exact opposite way. There, the debtor Eljer and its insurers were involved in several declaratory judgment actions regarding whether the debtors' policies provided coverage for claims by third parties related to Eljer's defective plumbing systems. As in this case, the policies were issued prior to the filing of a bankruptcy petition. Eljer sought to remove all the cases to bankruptcy court, and the bankruptcy judge remanded four of the cases to state court and abstained in the remaining two. The Seventh Circuit upheld the bankruptcy court's decision, based in part on its conclusion that the insurance proceedings were non-core. The Seventh Circuit applied the same test for classifying core proceedings enunciated in *Marathon*:

> Core proceedings are actions by or against the debtor that arise under the Bankruptcy Code in

> the strong sense that the Code itself is the source of the claimant's right or remedy, rather than just the procedural vehicle for the assertion of a right conferred by some other body of law, normally state law.

110 F.3d at 1268.

Following this correct standard, the Seventh Circuit ruled that Eljer's contract-based coverage claims arose from state law and could not qualify as core proceedings, notwithstanding the importance of the coverage question to the debtor's bankruptcy case:

> Eljer's claimed right to insurance coverage is a creation of state contract law and one that could be vindicated in an ordinary breach of contract suit if Eljer were not a bankrupt. The fact that it is an important right to the bankrupt — Eljer claims to be seeking $500 million in insurance coverage — is irrelevant. "Core" is a defined term in the Bankruptcy Code, a term of art, rather than a metaphor. The impact of a claim on the size of the debtor's estate is a criterion of whether a claim is related to the bankruptcy and is therefore a noncore proceeding. So Eljer has it backwards — arguing for classification as a core proceeding on the basis of a criterion for classification as a noncore proceeding.

Id. at 1268-69 (internal citations omitted).

Unlike the Second Circuit, the Seventh Circuit rightly maintained its focus on the nature of the rights, not the impact

of the proceeding on the bankruptcy court's other functions. Here, the nature of the right does not arise from the bankruptcy statutes, but from the contracts and the state law governing their interpretation. If the debtors were not bankrupt, these claims could be litigated independently of the reorganization; the Bankruptcy Code is merely a vehicle for asserting them in federal court. The assertion of the claims in bankruptcy court, and the fact that their outcome may be significant in allocating the debtors' estate, is not enough to render them core. In ruling to the contrary, the Second Circuit badly distorted the proper test. As with the debtor in *U.S. Brass*, the Second Circuit relied on considerations to classify the insurance claims as core that are relevant only to whether the claims are non-core.

In addition to the direct split between the Second and Seventh Circuits, the Supporting Respondents note that a number of decisions by the lower courts in the First and Third Circuits have specifically held that an action by a debtor or trustee against the debtor's insurer is a non-core proceeding. *See, e.g., Pozzi v. Merchants and Business Men's Mutual Ins. Co.*, 1992 WL 122904 (E.D. Pa. June 2, 1992) (debtors' declaratory judgment action concerning rights under insurance policy is non-core proceeding); *In re Ramex Int'l, Inc.*, 91 B.R. 313 (E.D. Pa. 1988) (trustee's cause of action for declaratory judgment under insurance policy issued pre-petition to debtor is not core proceeding); *In re R.I. Lithograph Corp.*, 60 B.R. 199 (D.R.I. 1986) (debtor's action for pre-petition breach of insurance contract based on refusal to pay claim is non-core).

III.

THE SECOND CIRCUIT'S DECISION WILL CAUSE HAVOC IN THE BANKRUPTCY COURTS.

The decision below gives rise to an unconstitutional situation in which the bankruptcy courts of the Second Circuit will be free to exercise core jurisdiction over claims not properly within their authority. The conflict between the Second Circuit and the other courts of appeal will lead to an unacceptable schism in which debtors in one circuit will have far-reaching powers to sweep all of their potential claims into a single proceeding finally adjudicated in the bankruptcy court. Aside from the moral hazard of encouraging forum shopping, the Second Circuit's aberrational decision raises the much more significant problem of improperly subjecting litigants to final judgments by judges without legitimate authority to preside over their disputes.

The deep respect for the federal judicial system in this country is founded in part upon the courts' careful delineation of their jurisdictional authority. In order for all parties to submit to the courts' power and for final judgments to have binding force, litigants must have faith that the forum in which they litigate is the proper authority to hear their claims. Similarly, litigants rely on the right to jury trial and plenary hearings by federal judges who are insulated from external pressures by life tenure and undiminished salaries. These guarantees are not lightly regarded; they are imbedded in the Constitution as the bedrock of our judicial system.

The Second Circuit's decision in this case creates unacceptable inroads into the vigilantly preserved contours of Article III jurisdiction. Rights traditionally deemed to arise

from the common law will now be swept into binding adjudications in legislatively-created bankruptcy courts based on their perceived importance to the debtor or the appeal of efficiency. If the decision below remains standing, this Court's prior teachings on the proper scope of the lower courts' jurisdiction will be sorely eroded, and litigants will be subjected to unconstitutional exercises of federal judicial power on an ad hoc basis. The Court should not countenance such a distortion of the letter and spirit of the Constitution, *Marathon*, and 28 U.S.C. § 157.

CONCLUSION

For the reasons set forth above, and those provided in the Petition, the Court should grant review in this case. The parameters of the bankruptcy courts' jurisdiction are too important to leave in a state of flux. As the law currently stands, this Court's prior rulings are being eviscerated, a conflict exists among the courts of appeal, and bankruptcy judges and litigants are left floundering in state of uncertainty. The Court's guidance is required to bring uniformity to the lower courts on the most fundamental judicial question of all: when and under what circumstances they have the power to act.

Respectfully submitted,

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No. 99-1273

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., WEST OF ENGLAND SHIPOWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), CONTINENTAL INSURANCE COMPANY, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON MUTUAL STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, AND MARINE OFFICE OF AMERICA CORP.,

Petitioners,

v.

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST AND ASBESTOS CLAIMANTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust (the "Trust"), a trust created by Bankruptcy Court order and Trust Agreement, does not issue shares in itself to the public, and has neither a parent nor subsidiary entities.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Cited Authorities	vi
Statement of the Case	1
A. Overview	1
B. Course of Proceedings and Disposition in the Court Below	2
C. Trust Organic Documents and the P&I Policies	3
D. The P&I Policy Dilemma	4
E. Declaratory Relief Sought in the Adversary Complaint	6
F. Inter-Relation of Insurers' Policies and Practices	6
G. Plan Provisions Relevant to Litigation of the Adversary Proceeding in the Bankruptcy Court	8
H. Organic Injunctions and Other Pertinent Adjustments in Claimants' Rights	9
I. Summary	10

Contents

Page

Reasons for Denying the Writ 11

I. The Second Circuit's Decision That A Complex Bankruptcy Litigation Is "Core" When Implicating Property Of The Estate In The Form Of Insurance Policies Fundamental To Reorganization And Asbestos Mass Tort Claims Resolution, Is Not In Conflict With Decisions Of This Court, Is Not Of General Utility In Clarifying The Law, Nor Is It Readily Comparable To Decisions Of Other Courts Of Appeals 11

A. The Adversary Proceeding Involves a Post-Petition Dispute as to P&I Policy Interpretation in the Context of Asbestos Mass Tort, an Essentially Different Case than *Northern Pipeline* 11

B. The Adversary Proceeding Clearly and Directly Affects Reorganization Asset Allocation, Contrary to Petitioners' Characterization 13

C. The Fact Sensitive Predicate of the Second Circuit's Decision Limits Both the General Importance of its Core Determination and its Utility to this Court in Clarifying the Law 15

Contents

Page

D. Judge Calabresi's Assessment That This Case Is Not the Appropriate Vehicle for Court Development of the Standard for Determining Whether All or Only Certain Post-Petition Breaches of Pre-Petition Contracts Are Core, Is Instructive 16

E. The Second Circuit's Essentially *Sui Generis* Core Decision Is Not Readily Comparable to Core Decisions of Other Circuits in Order to Evaluate the Degree or Significance of Conflict among the Circuits 16

II. The Second Circuit's Approval Of The Bankruptcy Court's Reasonable Exercise Of Discretion To Centralize In A Single Proceeding The Adjudication Of Core Insurance Coverage Issues Having On-Going Importance To A Major Reorganization And Thousands Of Current And Future Asbestos Mass Tort Claimants, In The Context Of A Maze Of Intertwined Insurance Policies Written Over A Forty-Year Period (Some With And Some Without Arbitration Clauses), Sensibly Accommodates Statutory And Historical Bankruptcy Precepts As Well As Arbitration Decisions Of This Court 21

Contents

Page

A. The Second Circuit's Decision Supporting, in the Extraordinary Circumstances of this Case, Centralized Complex Bankruptcy Litigation in Lieu of Both On-Going Limited Litigation and Fragmented Foreign Arbitrations, Is Consistent with Decisions of this Court 21

B. This Virtually *Sui Generis* Decision Does Not Conflict with Decisions of Other Courts of Appeals 24

C. This Factbound and Essentially Unique Case Has Little Utility in Articulating a General Standard Relating To Adjudication or Arbitration. 26

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

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Aasma v. American S.S. Owners Mutual Protection and Indemnity Assoc., Inc., 95 F.3d 400 (6th Cir. 1996) 26

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Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990) . 19

Bender Shipbuilding & Repair Co., Inc. v. Morgan, 28 B.R. 3 (9th Cir. B.A.P. 1983) 26

C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977) 25

Celotex Corp. v. Edwards, 514 U.S. 300 (1995) .. 24

Diamond Mortgage Corp. of Illinois v. Sugar, 913 F.2d 1233 (7th Cir. 1990) 19

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Page

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Cited Authorities

Page

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In re Wood, 825 F.2d 90 (5th Cir. 1987) 16, 20

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Keene Corporation v. Fiorelli, 14 F.3d 726 (2d Cir. 1993) 17

McReary Tire & Rubber Co. v. CEAT S.P.A., 501 F.2d 1032 (3d Cir. 1974) 25

Page

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Page

Statutes:

11 U.S.C. § 105(a) 12

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11 U.S.C. § 157(b)(2) 17

11 U.S.C. § 362(a) 17

11 U.S.C. § 363(1) 12, 17, 22, 23

11 U.S.C. § 365 ..... 12, 17, 22, 23

11 U.S.C. § 541(a)(1) 12, 23

11 U.S.C. § 541(c)(1) 12, 17, 22, 23

11 U.S.C. § 544(b) 20

11 U.S.C. § 1109(b) 20

11 U.S.C. § 1123(a) 17

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Page

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Page

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STATEMENT OF THE CASE

A. Overview

In January, 1993, the reorganization Trust filed a comprehensive complaint in the Bankruptcy Court, seeking in significant part a declaratory judgment defining its rights under insurance policies so as to meet its obligations to seamen seeking compensation for asbestos-related claims. Those claims, manifesting and continuing to manifest well after the demise of the insured shipping companies, generated a multi-faceted coverage dispute between the Trust and all of its predecessors' insurers. The eight insurers, four domestic and four foreign, had issued policies over the forty-year period before the shipping companies' 1986 bankruptcy filing.

Asbestos illness, insidious in its long latency before manifestation, was prominently considered in the Bankruptcy Court's confirming of a 1989 plan of reorganization. The Trust was then created, in part, to obtain insurance proceeds for the ultimate benefit of thousands of existing and anticipated asbestos claimants. After the reorganization, the Trust was met with hypertechnical insurance defenses — including defenses which linked each insurer to the others — constituting an insurance maze. That insurance maze has been exploited by all of the insurers to deny or drastically limit their responsibility, notwithstanding the criticality of the insurance coverage to the 1989 reorganization plan.

Included in their 1993 summary judgment motions, the four foreign insurers each sought foreign arbitration of the dispute under foreign law, notwithstanding fundamental Bankruptcy Code strictures which dictate the needs and responsibilities of the Trust on behalf of asbestos mass tort claimants. The Bankruptcy Court denied (in pertinent part) the insurers' motions, including the effort by half of them to fragment the unified litigation into a non-comprehensive case and multiple foreign arbitrations, and deemed the adversary proceeding to be core.

Years of appeals have now resulted in the Second Circuit's well-justified decision, which readily sustains the Bankruptcy Court's detailed and painstakingly developed decision. By any reading, this is a fact sensitive, intricate, and unique case, incorporating asbestos mass tort, bankruptcy, arbitration and multi-party considerations. It is not a case which can be readily synthesized, generalized about, or applied to large classes of cases.

B. Course of Proceedings and Disposition in the Court Below

The Trust is successor-in-interest to United States Lines, Inc. and United States Lines (S.A.) Inc. (collectively, "Debtors"), pursuant to the First Amended and Restated Joint Plan of Reorganization ("Plan"). The Plan was confirmed by order of May 16, 1989. Debtors had filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on November 24, 1986. *USL IV*, 3a.[1] Petitioners (and non-petitioning insurers), collectively referred to herein as the "defendants" or the "Clubs," each issued to the Debtors before the petition filing date certain insurance policies (the "P&I policies"). There are four domestic defendants and four foreign defendants. *Id.* The defendants issued all of the known maritime insurance coverage held by the entities that comprised the Debtors for a period of two generations. *USL I*, 76a. On January 5, 1993, the Trust initiated an adversary proceeding (the "Adversary Proceeding"), seeking a declaratory judgment defining the Trust's insurance coverage under the various P&I policies. *USL IV*, 4a. Asbestos claimants represented by The Maritime Asbestosis Legal Clinic ("MALC") intervened as plaintiffs. When the Clubs moved for

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1. The Trust refers to Petitioners' appendix and the four opinions below per the Petition ("*USL IV*" for the Court of Appeals, etc.). "Rb" refers to the extremely lengthy Bankruptcy Court record below contained in eight bound volumes and cataloged by document numbers 1-84, cited extensively in *USL II*, 49a, *et seq*. These volumes are included in the record forwarded to the Court of Appeals as "R2" (with "R" being the signal for the District Court docket numbering system).

summary judgment on a number of grounds, the foreign Clubs each demanded arbitration.

The Clubs' motions for summary judgment were, in all but one respect, denied, as were the four separate demands for arbitration. The proceeding was deemed to be "core." *USL I*, 136-37a. Defendants appealed, resulting first in the District Court's decision as to the scope of appeal, *USL II*, 49a, *et seq.*, and then its reversal of the Bankruptcy Court's core and arbitration decisions. *USL III*, 29a, *et seq.* On motion of the Trust, the District Court certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the Court of Appeals accepted the Trust's appeal and then reversed the District Court. *USL IV*, 17a.

C. Trust Organic Documents and the P&I Policies

The documents that are the genesis of the Trust ("Trust Organic Documents") are: (i) the Second Amended and Restated Disclosure Statement, dated February 23, 1989 ("Disclosure Statement"); (ii) the Plan; and (iii) the United States Lines, Inc. and United States Lines (S.A.), Inc. Reorganization Trust Agreement ("Trust Agreement"), dated February 23, 1990. *See* pertinent sections of the Disclosure Statement and complete copies of the Plan, Trust Agreement and Confirming Order, at Rb56 Exs. A, B, C and D, respectively. *See generally*, *USL I*, 79-80a.

The Trust, created to: (i) administer certain assets of the Debtors; (ii) resolve disputed claims; and (iii) distribute the Debtors' assets, has succeeded to all of the Debtors' right, title and interest in and to the P&I policies.[2] *USL II*, 51a; *USL I*, 79-80a. The Disclosure Statement provides in pertinent part that the Debtors "will transfer and assign to the USL Reorganization Trust substantially all their assets". Rb56 Ex. A at 34. The Plan clarifies that this conveyance includes all P&I insurance and that "[t]he USL Reorganization Trustee shall attempt to secure

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2. *See* Trust Agreement Recitals, Declaration of Trust, Art. II § 2.3 and Art. III § 3.1. Rb56 Ex. C.

for the benefit of the holders of the Personal Injury Claims all such insurance rights and Indemnification and Contribution Rights." Rb56 Ex. B at 13. Moreover, the Trust Agreement empowers the Trust "to enforce such Insurance Rights and Indemnification and Contribution Rights and to receive and retain as Reorganization Trust Assets any payments made with respect to such rights." Rb56 Ex. C at 6.

Accordingly "[t]he Reorganization Trustee shall deal with Insurers and Clubs, and make distributions to holders of Allowed Personal Injury Claims . . . as provided in the Plan. . . . The Reorganization Trustee shall release distributions from the USL Disputed Claim Reserve to holders of Disputed Claims which become Allowed Claims as provided in the Plan." Rb56 Ex. C at 7-8. Thus, the Trust is the entity intended by the Trust Organic Documents to enforce the P&I policies. *See USL I*, 79-80a.

D. The P&I Policy Dilemma

A maritime indemnity insurance program sits at the vortex of the confirmed plan of reorganization.[3] This insurance, as "property of the estate," provides the only mechanism for personal injury claimants of the Trust to recover cash compensation.[4] *USL I*, 80a; Rb55 ¶ 5. The vast majority of such claims, now over some 18,000, on behalf of almost 12,000 claimants, are asbestos related. *USL I*, 75-76a, as up-dated at ¶ 5 of 1996 Paulyson Affidavit attached as an exhibit to R19 (hereinafter "1996 Paulyson Aff.").

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3. As noted, over approximately 40 years, the eight Clubs insured Trust predecessors. Generally, one insurer covered a predecessor's entire fleet for a particular year. Exceptions abound, however, where certain ships were insured outside of fleet coverage by another insurer or under a different policy. Rb55 ¶ 4. *See USL I*, 79-80a.

4. The Plan dictates that distributions to pre-petition unsecured personal injury claimants are limited to certain securities issued by the reorganized entities ("Reorganization Securities") *unless* cash funds, as proceeds of the P&I policies, are forthcoming. (Plan Art. V(B)(1), (2), Art. VII (A)(1)(i)-(iv), *contained in* Rb56 Ex. B at 11, 13-14.)

Implementation of the Plan, as well as the Trust's administration, have been hampered by the following nearly overwhelming complexities:

(a) Thousands of known asbestos claimants (with additional claims yet to mature) sailed for various Trust predecessors, each claimant frequently sailing on many ships (some owned by Trust predecessors and some owned by unrelated companies) over careers of up to forty years, during which any number of different insurers covered Trust predecessor ships and those other ships pursuant to a patchwork of policy covers, rules and deductibles;

(b) Over the years, these insurers claimed different home territories, with all insurers distancing themselves from settlement efforts relating to asbestos-related claims filed in the Debtors' proceeding, and the foreign defendants maintaining their alleged inalterable and individual rights to arbitration of insurer-insured disputes in London;

(c) Asbestos-related illness, a modern class of mass tort covered by the P&I policies, was not and could not have been contemplated by the parties to the relevant insurance contracts at the time of their issue, yet over the covered years illness was developing in the bodies of effected seamen (though manifesting in largest part post-petition); and

(d) As to asbestos-related claims, the Clubs have maintained extremely technical and, from the Trust's point of view, obstructionist positions so as to stymie the clear Plan requirement that the Trust obtain cash from the P&I policies to distribute to claimants.

Rb55 ¶¶ 7 and 8; ¶¶ 5, 10, 11 and 27 of 1996 Paulyson Aff. *See USL I*, 75-81a.

E. Declaratory Relief Sought in the Adversary Complaint

By declaratory judgment, the Trust seeks to define Club obligations under the P&I policies.[5] The Trust seeks resolution of basic coverage issues as to the entire asbestos-related claim base, such as joint and several liability of insurers and policies, voiding Club efforts to "stack" deductibles, the propriety of a "Liman" procedure to satisfy the "pay first" provisions of the P&I policies (or Trust use of the PI Reserve established pursuant to the Plan or a similar mechanism for that purpose),[6] as well as Trust use of Reorganization Securities to satisfy deductible amounts. Rb1 ¶¶ 82-83. Declaratory relief is needed, *inter alia*, to implement the Plan and accomplish the vital purposes of the Trust. Rb55 ¶ 10. *See USL I*, 81a. The Bankruptcy Court found this to be the case, recognizing its subject matter jurisdiction over the Trust's declaratory action. *USL I*, 136-37a.

F. Inter-Relation of Insurers' Policies and Practices

All of the Clubs have affirmatively adopted, or refused to expressly reject, the position taken by American Club in a parallel proceeding regarding coverage "allocation" based upon an asbestos claimant's sailing history[7] as well as other

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5. In pleadings no defendant has conceded any of the relief sought by the Trust. Thus, all of the defendants deny the Trust's claims to relief at this stage of the Adversary Proceeding. Various defendants have affirmed their disputes with coverage, as alleged by the Trust. Rb57 Exs. 1 and 2. Moreover, certain defendants have raised affirmative defenses or otherwise responded in pleadings that such coverage was in doubt because of the insured's "insolvency" and the Trust's position as a would-be "assignee" of the policies. Rb57 Ex. 2. *See USL I*, 78a, 81a.

6. The nullifying effect of "pay to be paid" policy provisions in circumstances of shipowner insolvency was specifically referenced by the Bankruptcy Court, *USL I*, 78a, and emphasized by the Court of Appeals. *USL IV*, 11-12a.

7. Bankruptcy Judge Conrad summarized American Club's position regarding Prudential's successor, the PLI Trust, in (Cont'd)

factors.[8] American Club has argued, as an adjunct to its demand that applicable policy deductible amounts should be "stacked," that each such policy is only to be the source of a portion of the indemnification. The Trust seeks joint and several policy exposure.

By Club dictate, the asbestos claim resolution process thus includes a linkage among each and every potentially applicable P&I policy.[9] Emanating from this linkage is the complexity of

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(Cont'd)

In re Prudential Lines, Inc., 148 B.R. 730, 743 (Bankr. S.D.N.Y. 1992), *aff'd in part, rev'd in part*, 170 B.R. 222 (S.D.N.Y 1994), *appeal dismissed*, 59 F.3d 327 (2d Cir. 1995), as an allocation

> pro rata according to each claimant's sea service and exposure on PLI and other insured vessels. . . . Under this theory, if more than one policy is triggered, the Club need indemnify PLI only to the extent that exposure occurred on any given insured ship during its policy period. All triggered policies would then contribute to indemnify PLI for amounts paid according to the amount of time a particular seaman spent on PLI vessels as a proportion of the time he was exposed to asbestos. Each triggered policy would contribute in proportion to its policy limit to indemnify Trustee for the loss.

Judge Conrad's rejection of American Club's argument in favor of joint and several liability of each policy, *id.* at 744-45, was affirmed on appeal by the District Court. 170 B.R. at 233-36.

8. Adding to the bewildering complexity of the allocation approach, is the Clubs' argument that the Trust would have to seek out other allocate sharers of liability beyond other ship owners. That is, the Trust (rather than the Trust's indemnity insurer) would be obligated to claim against land-based co-tortfeasors such as manufacturers, suppliers and installers, in order to develop any comprehensive claim settlement. Rb55 ¶ 10.

9. Judge Conrad noted the existence of a multi-national entity composed, as of 1984, of fifteen major insurers, known as the International Group of Protection and Indemnity Associations ("International Group"), whose members act in concert through reinsurance or pooling agreements. *USL I*, 78a; *see also* J. Iain Murray, *The Protection & Indemnity Club and Bankruptcy: An English Perspective*, 59 Tulane L. Rev. 1445, 1449 (1985).

dealing with all insurers and other parties-in-interest to resolve but a single claim — given the typical seafarer's long sailing career.

The Trust also links all policies, but in a different manner. The Trust identifies the issuer of that policy covering a particular asbestos claimant having the lowest deductible amount as the primarily liable insurer. *See, e.g.*, Rb1 ¶ 29. Nevertheless, the Trust claims the right to indemnification, on a contingent basis, against each Club and every P&I policy that provided coverage to a Trust predecessor at any time, relative to each and every asbestos claimant.[10] *See* Rb1 ¶ 47. In the event the responsible Club and/or the P&I policy does not fund a settlement or judgment for any reason (including, *e.g.* insurer insolvency or the exceeding of a particular policy's limit), then the Trust would seek recourse against other equally liable Club(s).

G. Plan Provisions Relevant to Litigation of the Adversary Proceeding in the Bankruptcy Court

The Trust remains accountable to the Bankruptcy Court, which has retained jurisdiction over implementation of the Plan. "Notwithstanding confirmation of this Plan, the Court shall retain jurisdiction for the following purposes: . . . adjudication of any causes of action . . . brought by . . . the USL Reorganization Trust or other successor of any of the Debtors as the representative of the estates of the Debtors." Rb56 Ex. B at 20.[11] Moreover, the Plan explicitly directs the Trustee to litigate with the Clubs if the Clubs refuse to cover the Trust's exposure to asbestos-related claims.[12] Fundamental to the Plan

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10. This position is consistent with *In re Prudential Lines*, *supra*.

11 Judge Conrad recognized this jurisdictional retention provision of the Plan. *See USL I*, 93-94a; *see also* Rb56 Exh. B at 20.

12. Plan Article VII(A)(1)(ii) provides, in part:

> [T]he Club shall fund the portion of the Allowed Claim equal to the Allowed Excess P.I. Claims. To the extent any Club shall refuse to consent to such a program, the **USL Reorganization Trustee is authorized and directed to**

(Cont'd)

is the intent to facilitate asbestos claimant access to insurance coverage, with the Trust as the vehicle to garner insurance proceeds. *See* Plan Art. VII(A)(1)(i), *contained in* Rb56 Ex. B at 13-14.

H. Organic Injunctions and Other Pertinent Adjustments in Claimants' Rights

Personal injury claimants have been subject to a series of injunctions against litigation with the Debtors' estate, the reorganized entities, and the Trust. In sum, throughout the period of the record in this matter a permanent injunction barred litigation by all claimants against the reorganized entities, while a persisting injunction — subject to applications for relief — assured that the Trust will not be sued by personal injury claimants while settlement efforts are on-going.[13] For a detailed history of these injunctions, *see* Rb53 at 12-14.

In addition to the limitation on their rights to sue, personal injury claimants are not entitled to receive cash other than as proceeds of insurance. Rather, they are to receive Reorganization Securities, described in various sections of the Plan. *See* Rb56 Ex. B. *See also* Rb56 Ex. A at 26-28. Thus, cash payments are to be derived solely from the P&I policies. *See USL I*, 80a.

In sum, the rights of thousands of current asbestos claimants and future claimants have been adjusted by

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(Cont'd)

> **bring suit against the Club and to take all reasonable steps to obtain the benefits of Insurance** above the deductibles and the reimbursement of defense costs exceeding the applicable deductible, including the making of cash payments of Allowed Excess P.I. Claims.

Rb56 Ex. B at 14 (emphasis added).

13. On June 30, 1997 the Bankruptcy Court lifted the injunction barring litigation against the Trust by then existing MALC Asbestos Claimants.

Bankruptcy Court ordered restructuring, premised upon access to the P&I policies ("property of the estate").[14]

I. Summary

The Clubs refuse to acknowledge coverage of asbestos claims, coverage essential to the Trust's implementation of the Plan. That refusal takes the form of an "insurance maze,"[15] including a singular view of P&I policy provisions — such as "pay first" — which directly affects the administration of insolvent estates and the core function of asset allocation among creditors. *See USL IV*, 11-12a. That uniform refusal forms the basis for the Trust's declaratory judgment Adversary Complaint. *See USL IV*, 4a; *USL I*, 80-81a.

Given the complexity of this dispute, the Trust takes the position that only a court hearing at one time all issues pertaining to all parties in interest, can resolve the important matters raised in the Adversary Proceeding. The Bankruptcy Court is empowered to hear these issues, which go to the core of this reorganization and involve fundamental bankruptcy principles. Fragmented and multiple arbitrations would run counter to reason and offend the very purpose of the Bankruptcy Court in this case. The Bankruptcy Court, upon thorough review of the

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14. Consider the following illustration of but one aspect of the Clubs' uniform position abrading the Bankruptcy Code: no Club will concede that Plan created Reorganization Securities *pro rata* distributed will satisfy the payment of deductible requirements of the P&I policies. Yet the Trust cannot provide cash to pay deductibles, and the use of securities such the Reorganization Securities here, is a fundamental tool of Bankruptcy Code reorganizations. *See* 11 U.S.C. § 1123(a)(5)(J).

15. The "maze" consists of hyper-technical policy interpretations, such as: forcing the insured to obtain agreement from all potential sources as to apportionment of liability; stacking of deductibles according to different theories; refusal to recognize accepted Liman-type payment plans; resistance to the Trust's use of Reorganization Securities to satisfy deductible amounts; unjustified set-off claims; refusal to acknowledge the Trust as successor to the P&I policies (or even that an insolvent could remain insured); and like efforts to eliminate or minimize insurance coverage. *See, e.g.*, Rb55 ¶¶ 10 and 15.

applicable law and unique facts of this case, determined this matter to be "core" and not appropriate for a melange of limited litigation and multiple fragmented arbitrations. The Court of Appeals, in reversing the District Court's contrary determination, reviewed and supported the Bankruptcy Court's analysis and findings.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION THAT A COMPLEX BANKRUPTCY LITIGATION IS "CORE" WHEN IMPLICATING PROPERTY OF THE ESTATE IN THE FORM OF INSURANCE POLICIES FUNDAMENTAL TO REORGANIZATION AND ASBESTOS MASS TORT CLAIMS RESOLUTION, IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT, IS NOT OF GENERAL UTILITY IN CLARIFYING THE LAW, NOR IS IT READILY COMPARABLE TO DECISIONS OF OTHER COURTS OF APPEALS

A. The Adversary Proceeding Involves a Post-Petition Dispute as to P&I Policy Interpretation in the Context of Asbestos Mass Tort, an Essentially Different Case than *Northern Pipeline*

This case is thoroughly imbued with those public rights inherent in "the restructuring of debtor-creditor relations," i.e. those "at the core of the federal bankruptcy power". *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). As such, it is "distinguishable from the adjudication of state-created private rights, such as the right to recover contract damages that [was] at issue in" *Northern Pipeline*. *Id.* Contrast: (i) the reorganization trust's efforts to implement a long-confirmed plan as to even a single newly manifesting asbestos claim, met with the insurance maze which includes challenges to the Plan fundamentals derived from the Bankruptcy Code; and (ii) a garden-variety pre-petition contract dispute.

The Adversary Proceeding, a dispute over insurance coverage, developed after confirmation of a plan of reorganization that was in significant part grounded upon that coverage. The Trust seeks, in the Adversary Proceeding, a declaratory judgment defining its rights and obligations under the Debtors' marine insurance policies, which, as property of the Debtors' estate, were assigned to the Trust. The insurance coverage is the sole source of cash funding for the vast majority of claims filed, and to be filed, in this on-going bankruptcy — i.e., those thousands of asbestos-related claims that have manifested and will continue to manifest post-petition. Thus, the matter at bar has the following bankruptcy characteristics as reflected in the Bankruptcy Code: (i) concern for "the administration of the estate" (28 U.S.C. § 157(b)(2)(A)); (ii) impact upon "the liquidation of the assets of the estate [and] the adjustment of the debtor-creditor [and] the equity security holder relationship" (28 U.S.C. § 157(b)(2)(O)); (iii) involvement with "property of the estate" (11 U.S.C. § 541(a)(1)), which is critical to a confirmed plan of reorganization; (iv) specific inclusion in the contents of a plan of reorganization as a "means for the plan's implementation," and the corresponding approval of the use of property of the estate (11 U.S.C. § 1123(a)(5) specifically, and 28 U.S.C. § 157(b)(2)(M), generally); and (v) the inherent and necessary application of the overriding effect of the statutory scheme on executory contracts (11 U.S.C. §§ 365, generally, and 363(l) and 541(c)(1)). Those basic bankruptcy characteristics together with the mass tort continuing claim manifestation context of the Adversary Proceeding, well justify the Bankruptcy Court's exercise of its statutory power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11]". 11 U.S.C. § 105(a); *see also* §§ 1142(a) and (b). *See USL I*, 117a (referring to Plan implementation). The Bankruptcy Court's core holding, based upon a "strong nexus . . . between the Trust's adversary proceeding and the general reorganizational process," is likewise well-justified. *USL I*, 107a.

B. The Adversary Proceeding Clearly and Directly Affects Reorganization Asset Allocation, Contrary to Petitioners' Characterization

Petitioners mis-characterize the Adversary Proceeding, simply concluding that it "might theoretically have an *indirect* effect" on the important bankruptcy administrative function of asset allocation among creditors. Petition at 9. Such a conclusory presentation denudes this case of its unique factual predicate (*see* Point IC, *infra*), and ignores analysis and findings below.

At the Bankruptcy Court level a thorough analysis and review of facts, centered on asbestos illness and mass tort claims in bankruptcy, resulted in the following clear finding:

> [W]e find that the Debtors' insurance policies are property of the estate earmarked for distribution to a major class of claimants. *The Debtors' P&I policies are essential to the integrity of the Trust and to the Debtors' ability to reorganize.* The strong nexus that exists between the Trust's adversary proceeding and the general reorganizational process renders this declaratory action core under 28 U.S.C. § 157(b)(2)(A) and (O). Summary judgment for the Clubs will be denied.

USL I, 107a (emphasis added).

Like the Bankruptcy Court, the Court of Appeals readily accepted the undisputable proposition that "major insurance contracts are bound to have significant impact on the administration of the estate." *USL IV*, 10a. The Court of Appeals then painstakingly recounted its own recent experience with the nettlesome pay-first provisions of P&I

policies as applied to insolvent insureds.[16] *USL IV,* 11-12a (citing *DiCola v. American S.S. Owners Mut. Protection & Indem. Ass'n.*, 158 F.3d 65, 75 (2d Cir. 1998)). Court analysis then developed as follows:

> In addition to the difficulties involved in paying the claims, the Trust faces a significant risk that the payment scheme ultimately employed will be deemed not to satisfy the pay-first requirement. . . .
>
> If the Trust were initially to pay the claimants with assets earmarked for other creditors only to be informed afterwards that the payments did not trigger the Clubs' indemnification obligation, the result would be an inequitable distribution among the creditors. Therefore, in order to effectuate an equitable distribution of the bankruptcy estate, a comprehensive declaratory judgment is required to determine (1) whether a chosen payment plan will trigger the indemnification obligation and (2) the amounts payable under the insurance contracts. *Thus, the declaratory proceedings brought by the Trust in this case directly affect the bankruptcy court's core administrative function of asset allocation among creditors, and for that reason they are core.*

USL IV, 12a (emphasis added).

The Second Circuit's solid reasoning and practical decision, borne of its own experience and supported by the Bankruptcy Court's findings, is thus not as Petitioners portray that decision.

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16. The Bankruptcy Court addressed "pay first" with particularity, early in its opinion, as follows:

> P&I policies often contain a "pay to be paid" or "pay first" provision which, in the event of a shipowner's insolvency and absent creative undertakings, may render the policies unenforceable.

USL I, 78a.

C. The Fact Sensitive Predicate of the Second Circuit's Decision Limits Both the General Importance of its Core Determination and its Utility to this Court in Clarifying the Law

The case at bar has unique as well as highly complex essential facts. In this regard, the Bankruptcy Court found as follows:

> [T]here is no doubt as a matter of law that the P&I policies are property of the estate following the entry of the order for relief. And there is also no doubt, and we so hold, that the policies continue to exist as property of the estate despite confirmation of the Debtors' plan of reorganization and the transfer of the policies to a disbursement trust. *Our reasons for so holding are factual and, indeed, unique to the resolution of mass toxic tort claims in chapter 11 reorganizations. . . .*
>
> [T]he negotiation and liquidation of countless personal injury claims would have delayed confirmation of a plan for years — at the expense of other creditors and general policy goals favoring prompt corporate rehabilitation.
>
> *Again, the unique facts of this proceeding play a key role in our holdings.* Asbestos-related diseases are insidious and late-manifesting, thereby necessitating the existence and maintenance of a claims allowance process to compensate individuals whose injuries manifest anywhere from ten to forty years following initial exposure. Here, the Plan created the Trust to manage the special administrative concerns inherent in any chapter 11 case involving a large number of insidious personal injury claims.

USL I, 104-106a (emphasis added; footnotes omitted).

The case at bar is thus difficult to abstract, cannot be readily "boiled down" as Petitioners would offer (Petition at 2-3), and

is not an apt instrumentality for the grand and general review of the law of bankruptcy sought by Petitioners.

D. Judge Calabresi's Assessment That This Case Is Not the Appropriate Vehicle for Court Development of the Standard for Determining Whether All or Only Certain Post-Petition Breaches of Pre-Petition Contracts Are Core, Is Instructive

The three distinguished Court of Appeals Judges differed in their approach to "core", each suggesting his own formulation in matters of post-petition breach of pre-petition contracts. *See USL IV*, 9-10a, 18-22a, and 23-24a. However, Judge Calabresi made the clear point that this case in not the one in which general core law should or need be developed since "[l]ike Judges Walker and Newman, I have no doubt that this particular post-petition breach of a pre-petition contract is core. That is all I need to decide the instant case." *USL IV*, 24a.

His Honor's point is respectfully offered here in opposition to the Petition.

E. The Second Circuit's Essentially *Sui Generis* Core Decision Is Not Readily Comparable to Core Decisions of Other Circuits in Order to Evaluate the Degree or Significance of Conflict among the Circuits

There are Court of Appeals cases which would appear to conflict on the methodology for determining "core".[17] Whether, or the degree to which "matters concerning the administration of the estate" and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor creditor . . . relationship" have core vitality independent of a substantive

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17. *E.g.*, *compare and contrast*, on the one hand, *In re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987) and *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1399-1400 (2d Cir.), *vacated on the other grounds*, 498 U.S. 964 (1990), *opinion reinstated*, 924 F.2d 36 (2d Cir.), *cert. denied*, 500 U.S. 928 (1991), with *In re Wood*, 825 F.2d 90 (5th Cir. 1987) and *In re U.S. Brass Corp.*, 110 F.2d 1261 (7th Cir. 1997).

remedial Bankruptcy Code created right, would thus appear to be at issue. *See* 28 U.S.C. §§ 157(b)(2)(A) and (O).[18]

However, the Second Circuit's decision here, factbound and clearly Bankruptcy Code-dependent, does not in an illuminating sense reflect conflict among the Circuits.

Sub judice, the Trust's bankruptcy specific and bankruptcy transformed causes of action would not continue to exist in a simple contract action under state law. Indeed, the Bankruptcy Code expressly overrides state and foreign law provisions that would, outside of bankruptcy, vitiate bankruptcy-preserved or created causes of action.[19] (Congress may, within its constitutional limitations, alter and adjust state law entitlements in bankruptcy pursuant to its Bankruptcy Clause power, U.S. Const. art. I, § 8, cl. 4.) And, the Bankruptcy Code-dependent nature of this proceeding is not severable from its mass tort context.[20]

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18. Similarly, whether or the degree to which courts address the non-exclusivity of the § 157(b)(2) core list and the statutory admonition that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law", 28 U.S.C. § 157(b)(3), distinguishes cases.

19. *See generally* 11 U.S.C. §§ 363(1), 365, 541(c)(1), 1123(a) and 1142(a); *see also* §§ 105(a), 362(a) and 1141.

20. The continuing manifestation of "late-filed" claims, also a function of the extended bankruptcy proceeding, requires consistent ongoing oversight by the Bankruptcy Court of the entire process. *See generally*, *In re Manville*, 36 B.R. 743, 757-59 (Bankr. S.D.N.Y.), *appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984). This fact was envisioned by both the drafters of the Plan and the Bankruptcy Court. *See* Disclosure Statement III(F)(2)(c)(i); Plan Art. VII(A)(1)(iv), *contained in* Rb 56 Ex. B at 14; Confirming Order ¶ 28(x), *contained in* Rb 56 Ex. D at 23. This regime necessarily includes jurisdiction and control over the insurance policies, which includes control over the Clubs. *See generally*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997) (addressing the need to effect, comprehensively, a "fair and efficient means of compensating victims of asbestos exposure"); *Keene Corporation v. Fiorelli*, 14 F.3d 726, 732 (2d Cir. 1993) (chastising

(Cont'd)

Consider the following significant continuing effects upon the rights and obligations of the Debtors, the asbestos claimants and the Clubs, resulting from the filing and continuation of this bankruptcy case, the confirmation of the Plan and specific applications of the Bankruptcy Code:

(i) The Debtors have been discharged of all obligations, including those due asbestos claimants (11 U.S.C. § 1141; Plan Art. VIII, *contained in* Rb 56, Ex. B at 19; Confirming Order ¶ 7, *contained in* Rb 56, Ex. D at 11-12);

(ii) The Trust has been created as the mechanism to deal with all claims (Plan Art. VII(A), *contained in* Rb 56, Ex. B at 13-14; Trust Agreement § 3.2, *contained in* Rb 56, Ex. C at 6-7);

(iii) Continuing injunctions had persisted, including those applicable to claimants against the Trust, barring litigation against the Trust until certain settlement efforts have been undertaken (Plan Art. VII(A)(1)(iv), *contained in* Rb 56 Ex. B at 14; April 18, 1990 Order, *contained in* Rb 56 Ex. H; Confirming Order ¶¶ 8-9, 13(x), *contained in* Rb 56 Ex. D);

(iv) "Reorganization Securities," have become the medium of compensation to unsecured creditors for allowed claims, unless such claims are the subject of insurance (11 U.S.C. § 1123(a)(5)(B),(G) and (J); Plan Art. V(B)(1) and (2), *contained in* Rb 56 Ex. B at 11);

(Cont'd)
efforts at a mandatory class asbestos settlement, evading and in lieu of Bankruptcy Code application and a Title 11 proceeding, i.e. "the exclusive legal system established by Congress for debtors to seek relief" under such circumstances).

(v) The Debtors have been re-formed for operation post-confirmation (Plan Art. VII(B), *contained in* Rb 56, Ex. B at 14-15; Disclosure Statement Art. IV, *contained in* Rb 56 Ex. A at 18-21; Trust Agreement Recitals and Art. V, *contained in* Rb 56 Ex. C at 1, 14);

(vi) The P&I policies have become Trust property, to be used in its claim allowance and settlement functions (Plan Art. VII, *contained in* Rb 56 Ex. B at 13-18; Trust Agreement Declaration of Trust and § 2.3, *contained in* Rb 56 Ex. C at 2, 6); and

(vii) The panoply of overriding Bankruptcy Code provisions has been invoked, re-formulating otherwise applicable law and the P&I policy provisions so as to conform to federal requirements (including 11 U.S.C. §§ 363(l), 365, 541(c)(1), 1123(a)(5) and 1142(a)).

Thus, the subject *sui generis* decision leaves "no doubt that this particular post-position breach of a pre-petition contract is core."[21] *USLIV*, 24a.

21. Petitioners' cited cases are not comparable to the subject decision in functional bankruptcy terms. Focusing on abstention issues, *see In re U.S. Brass Corp.*, 110 F.3d 1261, 1268-69 (7th Cir. 1997) (primarily involving multiple *pre-petition* insurance coverage disputes, though "for completeness" (seemingly as *dictum*) opinion recites a narrower core standard than that of the First and Second Circuits; *see* n.17, *supra*). Distinguishable as garden-variety contract (or contract/tort) claims alleging at least some component of *pre-petition* breach/tort, are: *Diamond Mortgage Corp. of Illinois v Sugar*, 913 F.2d 1233 (7th Cir. 1990) (Chapter 11 debtor sued its former lawyers alleging pre-petition acts of malpractice); *Beard v. Braunstein*, 914 F.2d 434 (3d Cir. 1990) (Chapter 7 trustee's action against the debtor's former tenant to collect rents owed under pre-petition leases, and allegedly unpaid both pre and post bankruptcy petition; characterizing the action as "a garden variety contract claim", *id.* at 444, "merely for rent", *id.* at 445, the Third Circuit concluded that the Trustee's action "involving

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(Cont'd)
pre-petition contracts, allegedly breached both before and after the filing of the petition" was non-core (*id.*) and expressly limited to holding the subject facts, stating: "We are not presented with and thus do not decide whether . . . a claim only for the post-petition breach of a contract entered into pre-petition [is a] core matter[ ]." *Id.*); *In re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1986) (state law contract claims, apparently maturing pre-petition, asserted as counterclaims in Bankruptcy Court by a Chapter 11 debtor against a plaintiff who, pre-petition, had commenced a state court contract action against the debtor); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228 (3d Cir. 1994) (involved the issue of whether a Chapter 11 debtor's Unsecured Creditors' Committee could intervene, pursuant to 11 U.S.C. § 1109(b), in a non-core proceeding commenced pre-petition by the debtor against its auditors seeking damages for fraud and malpractice); and, *In re Apex Express Corp.*, 190 F.3d 624 (4th Cir. 1999) (Chapter 11 debtor's post-petition action against a former customer to collect penalties for fifteen pre-petition payments allegedly paid late; held that "accounts receivable claims against strangers to the bankruptcy proceeding . . . at least when grounded in state law and arising pre-petition, must be treated as non-core", *id.* at 631). Distinguishable as alleging *pre-petition* statutory violations are: *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989) (Chapter 11 trustee's action against the debtor's investment adviser alleging pre-petition violations of federal and state securities laws, and of related contractual and fiduciary duties; assertions included statutory and common law non-core causes of action for those violations, as well as core causes under 11 U.S.C. § 544(b)); and *Barnett v. Stern*, 909 F.2d 973 (7th Cir. 1990) (RICO action commenced pre-petition by two judgment creditors against an eventual Chapter 7 debtor and his son, which alleged that, prior to filing for bankruptcy, the debtor and his son had set up a sham trust in order to conceal assets). *In re Wood*, 825 F.2d 90 (5th Cir. 1987), involved only peripherally a Chapter 7 case and had no continuing bankruptcy attributes (post-petition action commenced by a co-owner of a medical clinic against his bankrupt business partner alleging that after the partner had filed for personal bankruptcy he had wrongfully issued medical clinic stock to himself in violation of their pre-petition business agreement; plaintiff did not file a proof of claim in his partner's bankruptcy proceeding). *In re Davis*, 899 F.2d 1136 (11th Cir. 1990), raised attorneys' fees issues under the Equal Access to Justice Act, 28 U.S.C. § 2412; *compare* the Second Circuit's reservation *sub judice* as to the core or non-core nature of attorneys' fees questions. *USL IV*, 12a.

II.

THE SECOND CIRCUIT'S APPROVAL OF THE BANKRUPTCY COURT'S REASONABLE EXERCISE OF DISCRETION TO CENTRALIZE IN A SINGLE PROCEEDING THE ADJUDICATION OF CORE INSURANCE COVERAGE ISSUES HAVING ON-GOING IMPORTANCE TO A MAJOR REORGANIZATION AND THOUSANDS OF CURRENT AND FUTURE ASBESTOS MASS TORT CLAIMANTS, IN THE CONTEXT OF A MAZE OF INTERTWINED INSURANCE POLICIES WRITTEN OVER A FORTY-YEAR PERIOD (SOME WITH AND SOME WITHOUT ARBITRATION CLAUSES), SENSIBLY ACCOMMODATES STATUTORY AND HISTORICAL BANKRUPTCY PRECEPTS AS WELL AS ARBITRATION DECISIONS OF THIS COURT

A. The Second Circuit's Decision Supporting, in the Extraordinary Circumstances of this Case, Centralized Complex Bankruptcy Litigation in Lieu of Both On-Going Limited Litigation and Fragmented Foreign Arbitrations, Is Consistent with Decisions of this Court

The Second Circuit's holding in favor of centralized adjudication of this complex matter, is summarized by that Court, as follows:

> In the instant case, the declaratory judgment proceedings are integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets. Furthermore, as we have previously pointed out, the bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor. . . . The need for a centralized proceeding is further augmented by the complex factual scenario, involving multiple claims, policies and insurers. The bankruptcy court was not clearly erroneous in finding that "arbitration of the disputes raised in the Complaint would prejudice

> the Trust's efforts to preserve the Trust as a means to compensate claimants." It was within the bankruptcy court's discretion to refuse to refer the declaratory judgment proceedings, which it properly found to be core, to arbitration.

USL IV, 17a (citations omitted).[22]

Thus, all of the important underlying facts that lead inexorably to the core determination *sub judice*, support adjudication of the Adversary Proceeding. And, "[l]ike any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *Shearson/ Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (1970) (the "New York Convention"), "which requires the recognition of agreements to arbitrate that involve 'subject matter capable of settlement by arbitration,' contemplates exceptions to arbitrability grounded in domestic law."[23] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

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22. The Bankruptcy Court held as follows:

> Clearly, the Clubs' alleged refusal to honor prepetition insurance policies endangers the Debtors' ability to resolve, by way of the Trust, the vast number of personal injury claims filed against it because, as we have said before, the P&I polices are the Trust's primary asset. Without the Clubs' good faith participation, Debtors will be unable to implement the Plan's procedures designed to allocate portions of the Debtor's property to individual claimants. *Moreover, arbitration of the disputes raised in the Complaint would prejudice the Trust's efforts to preserve the Trust as a means to compensate claimants. We will therefore exercise our discretion and deny arbitration.* [*USL I*, 118a (emphasis added).]

23. 11 U.S.C. §§ 363(1), 365, 541(c)(1) and 1142(a) reflect a strong bankruptcy policy which voids *ipso facto* clauses and encourages (Cont'd)

Inc., 473 U.S. 614, 639 n.21 (1985) (quoted in *USL IV*, 13-14a).

Again, both the Court of Appeals and the Bankruptcy Court amply cited Bankruptcy Code "chapter and verse", as well as the overarching unique and complex facts of this case, to well-justify the denial of multiple fragmented arbitration. *USL IV*, 14-16a; *USL I*, 116-118a. *Consider, inter alia*, the empowering provisions of 11 U.S.C. §§ 105(a)(c) and 1142(b), as well as 11 U.S.C. § 1123(a)(5) and Fed. R. Bank. P. 3020(d). Moreover, specific statutory sections aside, the *McMahon* standard allows the alternative inquiry into whether "[arbitration] inherently conflicts with the underlying purposes" of the competing statute. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989).[24]

(Cont'd)
continued business relations with bankrupts. However, as Judge Conrad observed:

> With respect to at least one key issue raised in the Trust's Complaint, we note that English law differs substantially from precedent in this Circuit. Compare *Firma C-Trade SA. v. Newcastle Protection and Indemnity Assoc.*, 2 ALL E.R. 705 (1990) (holding that insolvent shipowner could not recover under P&I policies) with *Liman v. American S.S. Owners Mut. Protection and Indem. Assoc.*, 299 F. Supp. 106 (S.D.N.Y.), *aff'd*, 417 F.2d 627 (2d Cir. 1969), *cert. denied*, 397 U.S. 936, 90 S. Ct. 946, 25 L.Ed. 2d 116 (1970) (permitted insolvent shipowner to borrow funds necessary to satisfy policy's pay first provision). [*USL I*, 112-13a.]

Thus, Bankruptcy Code policy as evidenced by §§ 363(1), 365, 541(c)(1) and 1142(a) would likely not be enforced by various foreign arbitrators applying English law.

24. "[A] chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period'. . . ." *Katchen v. Landy*, 382 U.S. 323, 328-29 (1966) (quoting the 1845 case of *Ex parte Christy*, 3 How. 292, 312, 11 L. Ed. 603). In furtherance of this purpose, " 'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts

(Cont'd)

B. This Virtually *Sui Generis* Decision Does Not Conflict with Decisions of Other Courts of Appeals

Petitioners would find in the Second Circuit's arbitration decision both a "clash" with this Court's decisions (Petition at 15), and a "conflict" with other Circuits. Petition at 19. Neither is the case. Arbitration, though favored, would be *absolute* as posited by Petitioners. That view "clashes" with *McMahon's* provision for overriding the Arbitration Act's mandate in appropriate circumstances. 482 U.S. at 226. And, it is the *McMahon* standard to which all Circuits must adhere.

Rather than conflicting with Third Circuit cases, the decision here at issue accommodates and respects that Circuit's formative decision. *Hays & Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989), a *non-core* case, is first relied upon and then readily distinguished by the Second Circuit as not involving fundamental bankruptcy precepts. *USL IV*, 15-16a. Petitioners' announcement of conflict between the Second Circuit and the Fifth Circuit's *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997), is likewise contrived, tailing off before actually identifying a conflict.

Petitioners advocate (Petition at 20) as follows:

> The Second Circuit's decision is also in conflict with the Fifth Circuit, which, in *In re National Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997), also rejected the core/non-core distinction for existence of a discretion, but recognized a discretion based on the "underlying nature of the proceeding, i.e.,

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so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate'." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). And, of course, the important underlying purposes of bankruptcy law have been with us since our earliest history. Petitioners' seeming contention (Petition at 22-26) that bankruptcy purposes somehow *post-date* a 1970 treaty adoption by Congress would ignore history and treat basic bankruptcy law as if it developed with the 1978 Code revision.

> whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the Code."

Compare this contrived and vague assertion of "conflict", with the actuality of the Second Circuit's positive reference to the Fifth Circuit case:

> Core proceedings implicate more pressing bankruptcy concerns, *but even a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration.* "Certainly not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code." *Insurance Co. of N.Am. v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re Nat'l Gypsum Co.)* 118 F.3d 1056, 1067 (5th Cir. 1997). *However there are circumstances in which a bankruptcy court may stay arbitration, and in this case the bankruptcy court was correct that it had discretion to do so.*

USL IV, 16a (emphasis added).[25] In fact, the Fifth Circuit held

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25. Other cases cited in the Petition (at 19-21) as being in conflict with the Second Circuit decision simply fail to implicate any bankruptcy precept at odds with arbitration. In fact, the following cited cases are not bankruptcy cases at all: *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993); *In re Sedco, Inc.*, 767 F.2d 1140 (5th Cir. 1985); *I.T.A.D. Assoc., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981); *C. Itoh & Co. (America) Inc. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977); and *McReary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974). Moreover, *In re Hart Ski Mfg. Co., Inc.*, 18 B.R. 154 (Bankr. D. Minn. 1982); *amended*, 22 B.R. 762 (Bankr. D. Minn. 1982), *aff'd*, 22 B.R. 763 (D. Minn. 1982); *aff'd*, 711

(Cont'd)

that "the Bankruptcy Court was within its discretion to deny [applicant's] motion to stay under the Federal Arbitration Act." *In re National Gypsum*, 118 F.3d at 1071.

C. This Factbound and Essentially Unique Case Has Little Utility in Articulating a General Standard Relating To Adjudication or Arbitration.

This factbound core matter calls for a single adjudication. There is no justification for cobbling together both on-going limited litigation and multiple fragmented arbitrations. This is not a simple insured-insurer dispute relating to a single or limited number of claims, nor a dispute where claims were fully manifested pre-petition. Rather, the matter at bar includes the following unique and complex features:

(i) involvement of all known insurers of Trust predecessors, covering seafarers exposed to asbestos over a 40-year period;

(ii) application to some 18,000 pending claims of almost 12,000 known claimants, and an unknown and presently indiscernible number of potential claims;

(iii) clear focus on a mass tort arising from the long-term presence of asbestos on the Debtors' ships;

(Cont'd)

F.2d 845 (8th Cir. 1983) and *Bender Shipbuilding & Repair Co., Inc. v. Morgan*, 28 B.R. 3 (9th Cir. B.A.P. 1983), decided before *McMahon*, can't override this Court's *McMahon* standard permitting the Bankruptcy Court to refuse in certain circumstances to enforce arbitration clauses; and, no bankruptcy fundamental was espoused in these cases. *Aasma v. American S.S. Owners Mutual Protection and Indemnity Assoc., Inc.*, 95 F.3d 400 (6th Cir. 1996) involved efforts of personal injury claimants to sue directly under indemnity insurance contracts of the bankrupt; the Sixth Circuit held that the claims against a foreign insurer must be arbitrated per the policies. However, this two party dispute involved no reorganization trust nor any overlay of the Bankruptcy Code on the pre-petition insurance contracts.

(iv) allegations of injury which, if asbestos-related, can only be identified generally as the result of asbestos exposure; exact origin is not discernable by any current scientific method;

(v) impact upon a measurable part of a nation-wide litigation morass that includes at the federal level pending Multi-District Litigation ("MDL") proceedings applicable to all federal asbestos cases (as distinguished from the bankruptcy claims now pending against the Trust);

(vi) allegations that all insurers (1) refuse to settle or commit to settle asbestos claims filed against the Trust; and (2) participate in the establishment of an "insurance maze" that befuddles Trust efforts to provide cash settlements to asbestos claimants;

(vii) allegations of linkage between and among all P&I policies (with the Clubs having taken the uniform position that each policy is only *pro rata* answerable for a long-term seafarer's asbestos illness and that many policy deductibles should be "stacked," while the Trust contends that all policies covering a particular seafarer's asbestos exposure are jointly and severally liable); and

(viii) Trust efforts to define its coverage and indemnification rights with respect to asbestos claims, on an on-going basis and for the life of the Trust.

In functional terms, the above-stated facts can be readily marshaled to demonstrate the need for a single complex litigation. Conversely, no benefit would result from allowing arbitration in these special circumstances,[26] since:

26. None of the three cases relied upon by Petitioners (at 22) in (Cont'd)

(i) Four foreign Clubs, of a total of eight defendants, request arbitration; if arbitration is granted, litigation would continue, impaired by the loss of essential parties;

(ii) The presence of multiple decision-makers (several arbitrators and the Bankruptcy Court) will increase the probability of inconsistent and incomplete results;

(iii) "Linkage" exists among all P&I policies (either as advocated by the Clubs, based upon their apparent "*pro rata* liability" theory, or by the Trust, based upon its claim that all applicable policies are jointly and severally responsible to indemnify long-term seafarers' illnesses);

(iv) The "insurance maze," gleefully exploited by each Club and frustrating Trust indemnification, would be expanded by multiple foreign arbitration proceedings;

(Cont'd)
support of their argument for the pre-eminence of a treaty, reflects the special circumstances and fundamental bankruptcy precepts here present. Neither *In re Sedco, supra*, nor *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992) involved any bankruptcy facts or considerations, while *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987) affirmed a *refusal* to enforce the New York Convention in light of a *foreign bankruptcy*. Victrix, a creditor of the bankrupt Swedish company, Salen, sought attachment here by moving pursuant to the New York Convention to confirm its English arbitration award (by default) and to enforce the British judgment. The Second Circuit upheld the District Court's denial of that motion, stating that "[i]n light of Salen's bankruptcy [the] enforcement [of the award and judgment] would conflict with the public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt." *Id.* at 714. Moreover, the Court of Appeals recognized that "a case such as this one . . . takes on a public character by virtue of Salen's insolvency and the institution of the Swedish bankruptcy proceeding." *Id.*

(v) Discovery is needed from the parties who want to absent themselves from the litigation, in order to determine the scope of indemnity insurance coverage available to the Trust; and

(vi) The full range of the Bankruptcy Court's centralized control over Plan implementation and Trust administration would be hampered, as would the Bankruptcy Court's ability to coordinate its efforts in administering the mass tort claims with the MDL.[27]

This easy case in which to deny arbitration is thoroughly factbound, unique and thus not an apt basis for articulating the general law.[28]

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27. [A]t this time: (1) we invite the various bankruptcy courts to coordinate with Judge Weiner concerning identification and implementation of the means necessary to secure their mutual objectives of fair and efficient resolution of bankruptcy cases and asbestos personal injury claims; (2) we request quarterly updates from the bankruptcy courts and Judge Weiner to the Panel identifying the procedural and substantive progress towards reaching those objectives. . . .

In re Asbestos Bankruptcy Litigation, No. 950, 61 U.S.L.W. 2408, 1992 WL 423943, at *2 (J.P.M.L. Dec. 9, 1992).

28. Petitioners' finale, asking the Court to "ensure that the United States complies with its obligations to the other nation signatories to the New York Convention", Petition at 26, invokes "the 'international contract' talisman" in circumstances where arbitration would produce an unfair burden on the Trust and conflict with the historic purposes of bankruptcy law. *Scherk v. Alberto Culver Co*, 417 U.S. 506, 529 (1974) (dissent). *Consider id.* at 517 n.11 (majority conceding potential attenuation of foreign contacts).

CONCLUSION

For the reasons set forth herein, the Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 99-1273

IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., WEST OF ENGLAND SHIPOWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), CONTINENTAL INSURANCE COMPANY, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, AND MARINE OFFICE OF AMERICA CORP.,

Petitioners,

v.

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST AND ASBESTOS CLAIMANTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1670

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Restatement of the Case	1
I. There Is A Clear And Significant Conflict Between The Second Circuit Decision On Core Jurisdiction And The Decisions Of This Court And Most Of The Other Courts Of Appeals. The Related Aspects Of The Bankruptcy Case Described By The Trust Are Irrelevant To The Core Jurisdiction Issue Or, Properly Considered, Confirm That The Matter Is Noncore	2
A. The Second Circuit Decision Is In Clear Conflict With The Teaching of *Northern Pipeline* And The Majority Of Other Circuit Courts	3
B. The Numerous Features Of This Bankruptcy Case Described By The Trust Are Extraneous To Or Easily Separable From This Adversary Proceeding And Do Not Render It Core	5
II. This Petition Presents An Opportunity To Establish A Bright-Line Rule Resolving The Clash Between Arbitration And Bankruptcy	7
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Cook v. United States, 288 U.S. 102 (1933) 9

In re Arnold Print Works, Inc., 815 F.2d 165 (1st Cir. 1987) 5

In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990), *vacated on other grounds*, 498 U.S. 964 (1990), *opinion reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 500 U.S. 928 (1991) 5

In re Dollar Corporation, 139 B.R. 192 (Bankr. E.D. Mich. 1992) 7

In re National Gypsum Co., 118 F.3d 1056 (5th Cir. 1997) 10

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1983) 8, 9

Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 1, 2, 3, 4

Northern Securities Co. v. United States, 193 U.S. 197 (1904) 8

Sedco v. Petroleos Mexicanos Mexican National Oil Company, 767 F.2d 1140 (5th Cir. 1985) 7

Cited Authorities

	Page
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987)	8, 9, 10
TransWorld Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984)	9
Vesta Fire Insurance Corp. v. New Cap Reinsurance Corp. Ltd., 2000 WL 135175 (S.D.N.Y. 2000)	7
Statutes:	
11 U.S.C. § 105(a)	8
11 U.S.C. § 105(c)	8
11 U.S.C. § 1123(a)(5)	9
11 U.S.C. § 1142(b)	9
28 U.S.C. § 157(a)	4
United States Constitution:	
Article VI	9
Rules:	
Fed. R. Bank. P. 3020(d)	9

Cited Authorities

Page

Treaties:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (1970) 8, 9

RESTATEMENT OF THE CASE

The two questions for which review by this Court is sought are both bright-line issues of fundamental importance. The Trust's attempt to show that they are fact intensive and *sui generis* is unfounded and an obvious effort at obfuscation. Most regrettably, some of the factual points emphasized by the Trust are plainly wrong.[1] But none of these factual inaccuracies affect the highly important issues we ask this Court to consider.

The "core issue" we ask the Court to review is of basic importance to bankruptcy law generally and has major implications which go far beyond this particular case. The Second Circuit's ruling is in direct conflict with this Court's decision in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, ("*Northern Pipeline*"), 458 U.S. 50 (1982) and rulings of other circuits. The Second Circuit's decision could affect every bankruptcy case which involves alleged post-petition breaches of pre-petition contracts. The holding that such disputes are "core" and to be decided by the bankruptcy court is a major departure from the very clear direction this Court

1. For example, the Trust knows that MALC's claims do not involve an actual "mass tort." Indeed, in a very recent and important development, at a hearing in the bankruptcy court on February 29, 2000, Bankruptcy Judge Gonzalez announced that he will be entering an order on or about March 7, 2000 granting the Trustee's motion to expunge virtually all of MALC's asbestos claims. The Trust is also in error in referring to what it calls a "P & I policy dilemma" and an "insurance maze." The undisputed fact is that, with a single exception, at no time has the Trust made an actual indemnity claim against any of the insurers with respect to MALC's claims. The one exception was a claim which was settled by the Trust with the approval of the Clubs and for which the Trust was reimbursed by two of the Clubs.

set down in *Northern Pipeline*. Even the Trust recognizes the great importance of the "core" issue. Having lost in the District Court, the Trust succeeded in obtaining interlocutory review in the Second Circuit. Throughout, the Trust has been loud and clear in trumpeting the importance of the policy question raised.

The arbitration issue also involves a policy question of the first order of importance. The Second Circuit's ruling that a bankruptcy judge has discretion to annul an otherwise valid and enforceable foreign arbitration agreement is in direct conflict with prior decisions of this Court and of other circuit courts. For many years, this Court has steadily promoted arbitration, especially in international commercial agreements. The Second Circuit's decision undermines the policy of promoting arbitration and directly conflicts with the Treaty obligations of the United States.

I.

THERE IS A CLEAR AND SIGNIFICANT CONFLICT BETWEEN THE SECOND CIRCUIT DECISION ON CORE JURISDICTION AND THE DECISIONS OF THIS COURT AND MOST OF THE OTHER COURTS OF APPEALS. THE RELATED ASPECTS OF THE BANKRUPTCY CASE DESCRIBED BY THE TRUST ARE IRRELEVANT TO THE CORE JURISDICTION ISSUE OR, PROPERLY CONSIDERED, CONFIRM THAT THE MATTER IS NONCORE

On the first question presented for review, *i.e.*, whether a bankruptcy judge constitutionally has core jurisdiction to determine rights under pre-petition insurance contracts, the Trust largely relies on arguments which are both new and

peripheral to the question. While avoiding a straightforward acknowledgment that the Second Circuit decision herein is in conflict with this Court's teaching and the majority of the other circuits, the Trust advances an irrelevant detailed factual argument in an attempt to isolate the decision as being merely "*sui generis*" and hence unworthy of consideration. However, questions of jurisdiction always arise in different factual and procedural contexts. Surely, especially in light of existing authority, so fundamental a question as a court's constitutional jurisdiction should not depend to any great extent on a nice assessment of the sort of confusing and tangential considerations advanced by the Trust.

A. The Second Circuit Decision Is In Clear Conflict With The Teaching of *Northern Pipeline* And The Majority Of Other Circuit Courts

Acknowledging that *Northern Pipeline*, 458 U.S. at 71, describes "the restructuring of debtor-creditor relations" as being "at the core of the federal bankruptcy power," the Trust can do no more than claim that "[t]his case is thoroughly imbued with those public rights inherent in" such restructuring. T. Br. 11.[2] Whatever that vague and dubious assertion might mean, it cannot fairly be said that the insurance contract rights, independent of and antecedent to the reorganization petition, are, contrary to *Northern Pipeline*, transformed into public rights because the Trust seeks to enforce them. *See id.* at 71-72, 84. The Trust merely demonstrates that adjudication of those rights is related to the bankruptcy case, a point never disputed.

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2. References to the Trust's brief in opposition are "T. Br. __."Abbreviations are taken from the petition.

The Trust's predicament is emphasized by its subsequent litany of the adversary proceeding's "bankruptcy characteristics," employing only phrases indicating that the adversary proceeding is related to the bankruptcy case rather than actually being core under the terms of *Northern Pipeline*. Thus, the Trust mentions the proceeding's: "(i) concern for . . . (ii) impact upon . . . (iii) involvement with . . . (iv) specific inclusion in the contents of a plan of reorganization . . . (v) the inherent and necessary application of [bankruptcy statutes (always applicable in bankruptcy matters — core or noncore)] . . . ." T. Br. 12. Such references only make it clearer that the adversary proceeding is not "core" under *Northern Pipeline*, but a "related to" proceeding. *See* 28 U.S.C. § 157(a) (146a). The Trust's foregoing "related to" assertions are in keeping with the erroneous views of the Bankruptcy Court in basing its "core" decision only on a "strong *nexus* . . . between the . . . adversary proceeding and the general reorganizational process . . . ." T. Br. 12 and *USL I*, 107a (emphasis added). Judge Walker of the Second Circuit made the same error, stating ". . . the declaratory proceedings . . . directly *affect* the bankruptcy court's core administrative function . . . ," T. Br. 14 and *USL IV*, 12a (emphasis added), after his initial error of applying a test of whether the proceeding (rather than the contract right) is independent of the reorganization, *USL IV*, 8a, an error the Trust studiously avoids mentioning despite our emphasis of it. Petition, 8-9.

Clearly each of the Second Circuit's three opinions holding this matter core is also in conflict with the majority of the other circuits. The Trust does not seriously deny the conflict, and can only vaguely argue that the cases cited in the Petition "are not comparable to the subject decision in functional bankruptcy terms," Tr. Br. 19 n.21, an irrelevant consideration. The Trust cites only two circuit court cases

holding adversary proceedings core, purportedly illustrating "conflict on the methodology," *In re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987) and *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990), *vacated on other grounds*, 498 U.S. 964 (1990), *opinion reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 500 U.S. 928 (1991). T. Br. 16 n.17. Both cases are inapplicable, as they concern contracts entered into post-petition by the debtor which were neither antecedent to nor independent of the petition, in sharp contrast to the pre-petition contracts here. Indeed, the Trust's citation of those cases starkly reveals the hollowness of its arguments.[3]

B. The Numerous Features Of This Bankruptcy Case Described By The Trust Are Extraneous To Or Easily Separable From This Adversary Proceeding And Do Not Render It Core

The Trust asserts that the Plan explicitly directs the Trust to litigate with a Club if it refuses to cover the Trust's exposure to asbestos claims, quoting an excerpt from the Plan, T. Br. 8 and 8 n.12, in a way which could misleadingly suggest that the Plan mandates funding of allowed claims by a Club.

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3. The Trust refers to Judge Calabresi's opinion, claiming that he "made the clear point" that this case is not the one to develop general core law. T. Br. 16. In fact, Judge Calabresi expressed disagreement with Judge Walker's basic approach (23a), concluded the matter was core but gave no reasons and took no stand as to whether to follow Judge Newman's (erroneous) "bright-line rule", a situation analysis, or something in between (24a). The "clear point" he made was one of deep uncertainty which, if anything, highlights the need for this Court's guidance.

The Bankruptcy Court's opinion includes the same misleading quotation, which could well have contributed to its error. *USL I*, 80a. The Plan's direction for the Trust to bring suit to obtain the benefits of insurance necessarily refers only to insurance under the pre-petition policies, which are independent of the Plan.[4]

The Trust quotes extensively from the Bankruptcy Court and Second Circuit opinions. T. Br. 13-16. However, these quotations are irrelevant to the core issue because, even accepting the importance of establishing rights under the pre-petition insurance contracts before paying possible claims, they give no significant reason why such rights should not be established on a non-core basis, as required under the Constitution.

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4. In fact, Plan Article VII(A)(1)(ii) provides in part:

> . . . the . . . Trustee is authorized to enter into agreements with the Clubs which provide in substance that . . . the Clubs shall make cash payments directly to the holder . . . of any Allowed Personal Injury Claim in excess of the applicable deductible for that claim (the Excess P.I. Claim). In such event [*i.e.*, only if a Club agrees] . . . the Club shall fund the portion of the Allowed Claim equal to the Allowed Excess P.I. Claim. To the extent any Club shall refuse to consent to such a program, the USL Reorganization Trustee is authorized and directed to bring suit against the Club and to take all reasonable steps to obtain the benefits of Insurance above the deductible and the reimbursement of defense costs exceeding the applicable deductible, including the making of cash payments of Allowed Excess P.I. Claims . . .

Rb56 Ex. B at 13-14.

II.

THIS PETITION PRESENTS AN OPPORTUNITY TO ESTABLISH A BRIGHT-LINE RULE RESOLVING THE CLASH BETWEEN ARBITRATION AND BANKRUPTCY

The petition, if granted, provides the Court with the opportunity to resolve a "conflict of near polar extremes," *USL IV*, 15a (citation omitted), that the Second Circuit has now decided in favor of the Bankruptcy Code. The issue should be, as suggested in *In re Dollar Corporation*, 139 B.R. 192, 197 (Bankr. E.D. Mich. 1992), "subject to Supreme Court review given the importance of international arbitration in a bankruptcy context. . . ." The Trust would have this Court defer review of *USL IV*'s abrogation of the United States' "Treaty obligations with 65 nations"[5] on the basis that the decision is "virtually *sui generis*" and an "essentially unique case [that] has little utility in articulating a general standard relating to adjudication or arbitration." T. Br. 24 and 26. It proposes, therefore, that the Pandora's box that it has opened can or has been closed. That is wishful thinking. *See Vesta Fire Insurance Corp. v. New Cap Reinsurance Corp. Ltd.*, 2000 WL 135175*5 (S.D.N.Y. 2000) (". . . when a dispute involving both the Bankruptcy Code and the [FAA] 'presents a conflict of near polar extremes' . . . it is the Bankruptcy Code that has often carried the day — even where international arbitration agreements are compromised [citing *USL IV*, 15a-17a].").

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5. *Sedco v. Petroleos Mexicanos Mexican National Oil Company*, 767 F.2d 1140, 1145 (5th Cir. 1985).

Justice Holmes stated in dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904):

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

The Trust's rhetoric of "overwhelming complexities," T. Br. 5, and the "nation-wide litigation morass," T. Br. 27, persuaded the Second Circuit that the facts before it were of "immediate overwhelming interest" and that it should therefore ignore the mandatory directions not only of the FAA but also the New York Convention and this Court's directions in respect of both. In so doing, as the Trust appears to recognize in its "*sui generis*" assertion, well settled principles governing international arbitration were overturned.

The Trust asserts that under *Shearson/American Express, Inc. v. McMahon*, ("*McMahon*"), 482 U.S. 220, 226 (1987) the FAA may be "overridden by contrary congressional command" and, under *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ("*Mitsubishi*"), 473 U.S. 614, 639 n.21 (1983) there may be "exceptions" to the New York Convention "grounded in domestic law." T. Br. 22-23. The Trust appears to assert that 11 U.S.C. §§ 105(a) and (c),

1123(a)(5), 1142(b) and Fed. R. Bank. P. 3020(d) are the "empowering provisions" and "specific statutory sections" that satisfy the "*McMahon* standard" of "contrary congressional command." T. Br. 23.

The Trust is incorrect. Those "specific statutory sections" provide no "contrary congressional command" to the mandate of the FAA, let alone the New York Convention. Indeed, the Trust entirely ignores the Supremacy Clause, Article VI, of the Constitution and the requirement that in applying the "*McMahon* standard" to the New York Convention, as a treaty, to establish a bankruptcy exception "such purpose on the part of Congress" must be "clearly expressed." *TransWorld Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) *quoting Cook v. United States*, 288 U.S. 102, 120 (1933). The Trust's only attempt to address the complete absence of any *express* congressional override of the New York Convention is confined to its footnote asserting that the "important underlying purposes of bankruptcy law" pre-date the United States' accession to the New York Convention and, therefore, rules of construction applicable to treaties, as stated in *TransWorld*, are inapplicable. T. Br 23-24 n.24. The Trust's application of the "*McMahon* standard" fails to recognize Justice Blackmun's statement that "we decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not **expressly** directed the courts to do so." *Mitsubishi*, 473 U.S. at 639 n.21 (emphasis added). The Trust's further attempt to avoid the issue by again resorting to arguments of "the special circumstances and fundamental bankruptcy

precepts here present" reveals the paucity of its argument. T. Br. 28 n.26.[6]

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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6. The Trust's assertion that *USL IV's* conflict with *In re National Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997) is "contrived" ignores the very point made there for a discretion to deny domestic arbitration where the "underlying proceeding . . . derives exclusively from the provisions of the Bankruptcy Code. . . ." T. Br. 24-25. The Trust's averment of "fundamental bankruptcy precepts" cannot replace the nature of the "underlying proceeding" as a pre-petition contract dispute. T. Br. 24. Its distinction of the other circuit authorities said by the Clubs to be in conflict with *USL IV* as failing "to implicate any bankruptcy precept at odds with arbitration" or as pre-dating the "*McMahon* standard" is not an answer to the fact of a conflict but an unconvincing rationale for the conflict. T. Br. 25-26 n.25.

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